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1315

United States

1315

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH HOTCHNER,

Appellant,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation,

Appellee,

and

JOSEPH HOTCHNER,

Appellant,

vs.

R. E. MORGAN and P. C. LONG,

Appellees.

Transcript of Record.

Upon Appeals from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

FILED

AUG 14 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH HOTCHNER,

Appellant,

vs.

FEDERAL ELECTRIC COMPANY, a California
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Second Division.

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Docket 577

DOCKET.

UNITED STATES DISTRICT COURT.

Title of Case.	Attorneys.
Joseph Hotchner	Carlos P. Griffin.
vs.	Infringement of Letters
Federal Sign System Electric et al.	Patent.
	Chas. E. Townsend.

Date		
Month	Day	Year.
Nov. 1,	1920.	Filed Complaint. Filed Prae- cipe. Issued Subpoena ad Res. and 1 copy.
Nov. 9,	1920.	Filed Subpoena ad Res. with Marshal's return showing service on Federal Sign Sys- tem Electric on Nov. 3, 1920.
Nov. 23,	1920.	Filed Answer.
Jan. 22,	1921.	Filed Notice of Motion to Amend Answer, etc. Filed Amended Answer.
Feb. 7,	1921.	Filed Notice of Taking Deposi- tions. Ord. Motion to Amend Answer Granted.
Feb. 9,	1921.	Filed Deposition of Paul D. Howse and J. E. Tucker.
Feb. 14,	1921.	Filed and Entered Stipulation and Order in re Depositions de Bene Esse. (O. B. 7, p. 390).

Feb. 17, 1921.	Filed Deposition of C. E. Heft et al. Filed Defts. Exhibits "AA," "BB," "CC," "DD," "EE," "FF."
Mar. 17, 1921.	Filed Depositions.
Aug. 1, 1921.	Ord. Cause Set for Sept. 30.
Sept. 30, 1921.	Ord. Cause Con. to Oct. 25.
Oct. 19, 1921.	Ord. Cause Con. to Nov. 3.
Oct. 31, 1921.	Filed and Entered Stip. and Or- der Continuing Trial. (O. B. 8, p. 77). Ord. Suit Dropped from Calendar.
Nov. 23, 1921.	Filed Notice of Motion Setting Case for Trial.
Nov. 28, 1921.	Ord. Cause Set for Dec. 6.
Dec. 6, 1921.	Ord. Trial, Plff. Allowed to Amend Bill. Filed Affidavit of Simpson. [1*]
Dec. 7, 1921.	Filed Amended Bill. Ord. Plff. Allowed to File Amended Bill; Suit Dismissed, etc.
Dec. 9, 1921.	Filed and Entered Final De- cree. (Eq. Journal 5, p. 78). Made and Filed Enrolled Pa- pers. Dockets.
Dec. 12, 1921.	File Mem. of Costs.
Dec. 15, 1921.	Made Certd. Copy Decree.
Dec. 28, 1921	Filed Petition for Appeal. Filed Assignment of Errors. Filed and Entered Order Fix- ing Bond. (O. B. 8, p. 128). Filed Bond on Appeal.

*Page-number appearing at foot of page of original certified Transcript of Record.

Jan. 19, 1922. Filed Citation. Filed Praecipe
for Record.
Jan. 28, 1922. Filed Stipulation for Record on
Appeal. Filed Statement of
Evidence. [2]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation,

Defendant.

Amended Bill of Complaint.

To the Honorable the Judges of the District Court
of the United States in and for the Northern
District of the State of California, in Chancery
Sitting.

Joseph Hotchner, a citizen and resident of the
State of California, brings this his bill of complaint
against the Federal Electric Company, a duly or-
ganized and existing California corporation, hav-
ing a regularly established place of business in the
City and County of San Francisco, State of Califor-
nia, and thereupon complainant alleges and avers:

1. That upon the 19th day of October, 1914, com-
plainant did file in the United States Patent Office

application for patent on a certain new and useful improvement in Electric Signs heretofore invented by him and of which he then was the original, first and sole inventor, which improvement was not known or used by others before his invention thereof and which had not been in public use or on sale in the United States for more than two years prior to this application for a patent thereon, nor inscribed in any printed publication more than two years prior to his said patent application and not patented to him or his legal representatives or assigns in any country foreign to the United States on an application filed by him or his legal representatives prior to said patent application.

2. Complainant further alleges and avers that being entitled to a patent upon said electric sign under the provisions of the statutes of the United States upon due proceedings had and all of the requirements of the statutes having been duly complied with, letters patent thereupon was duly issued to [3] him by the Commissioner of Patents bearing date of March 12, 1918, under the number 1,259,237. Thereupon said letters patent was delivered to complainant whereby and wherein was granted and secured to him, his heirs and assigns for the term of seventeen years from the date thereof, the full and exclusive right to make, use and vend to others to be used said improvements and invention, a description whereof is given in the specifications forming a part of said patent grant, and which patent or a certified copy thereof

is hereby proffered for the inspection of this Honorable Court.

3. That upon the 19th day of October, 1914, complainant did file in the United States Patent Office application for patent on a certain new and useful improvement in Electric Sign heretofore invented by him and of which he then was the original, first and sole inventor, which improvement was not known or used by others before his invention thereof and which had not been in public use or on sale in the United States for more than two years prior to this application for a patent thereon nor described in any printed publication more than two years prior to his said patent application, and not patented to him or his legal representatives or assigns in any country foreign to the United States on an application filed by him or his legal representative prior to said patent application.

4. Complainant further alleges and avers that being entitled to a patent upon said electric sign under the provisions of the statutes of the United States upon due proceedings had and all of the requirements of the statute having been duly complied with, letters patent thereupon was duly issued to him by the Commission of Patents bearing date of September 2, 1919, under the number 1,315,187. Thereupon said letters patent was delivered to complainant whereby and wherein was granted and secured to him, his [4] heirs and assigns for the term of seventeen years from the date thereof, the full and exclusive right to make, use and vend to others to be used, said improvements and inven-

tion, a description whereof is given in the specification forming a part of said patent grant, and which patent or certified copy thereof is hereby proffered for the inspection of this Honorable Court.

5. Complainant further alleges and avers that the said patents and improvements in electric signs have been and are in his exclusive possession and ownership, save for certain licenses to manufacture said signs granted by him to certain duly accredited licensees, which licensees have introduced said signs into wide use, duly marking the signs made by them with the words "Hotchner Patent" together with the date of the patent concerned and that such licenses have proved to be valuable to complainant by reason of the license fees paid to him. That complainant has expended large sums of money in developing and introducing the said electric signs into use and that the public generally has acquiesced in his exclusive rights and privileges as secured by each of said patents and but for the infringement herein complained of, the complainant would now be in undisturbed possession and enjoyment of the exclusive rights and privileges secured to him by each of said patents.

6. Complainant further shows that said defendant, Federal Electric Company, well knowing the premises, and without right, license or other authority and in violation of complainant's said rights under the patents aforesaid, has within the Northern District of the State of California, subsequent to the issue and during the term of the latest of said letters patent, made or caused to be made for use

and has vended to others to be used, a number of electric signs which made conjoint use of the inventions disclosed in each of said patents, one such sign reading "Normal Pharmacy" and being [5] made for A. S. Pencovic and installed and used at 1101 Broadway, Oakland, California, and another such sign reading "Harry Rose, Haberdasher, Al Chase, Clothier," being installed adjacent the Normal Pharmacy sign. How many more such signs defendant has made and sold complainant cannot state, but he prays that defendant may be compelled to discover and disclose the number of such signs made by them which contain substantially the improvements patented to him in each of the above mentioned patents. Complainant further alleges that Tracy W. Simpson is the manager of the Federal Electric Company, and also does business in the name of Federal Sign System Electric, and that bills presented to the purchasers for said signs bear the names Federal Electric Company and Federal Sign System Electric.

Complainant further alleges and avers that defendant, Federal Electric Company persists in the manufacture and sale and offering for sale of electric signs which infringe said letters patent and each of them, and though warned in writing to desist therefrom, threaten to continue to make and vend to be used illuminated signs which infringe each of said patents and complainant further fears that said defendant will continue such infringement upon his exclusive rights in the future, whereby great gains and profits heretofore accruing to com-

plainant, will accrue to defendant which in equity belong to complainant, to his great damage, and complainant has now sustained damages by reason of violation of his rights and will continue to sustain further damages if such infringement be not restrained.

To the end, therefore, that said defendant may, if it can, show why your complainant should not have the relief herein prayed, and may, and according to the best of its knowledge, remembrance, information and belief, but not under oath, answer under oath being expressly waived, full, true, direct and perfect answer make to all and singular the premises, and that defendant may be decreed to [6] account for, and pay over to your orator all gains and profits realized by it, from the unlawful using, making or vending of the improvements vested in your complainant under the patents aforesaid; and in addition thereto, the damages sustained by your orator by reason of such infringement, to be assessed by or under the direction of your Honors, and that your Honors may increase the actual damages to three times the amount of such assessment under the circumstances of the willful and unjust infringement by said defendant, and that defendant may be perpetually restrained by an injunction issuing out of this Honorable Court, from making, using, or vending illuminated signs containing the improvements secured to your orator under said patents, and that your orator have such other or further relief as equity may deem just, together with the costs of this action.

May it please your Honors to grant to complainant not only a writ of injunction, conformable to the prayer of this bill, but also an injunction *pendente lite*, and also a writ of subpoena, directed to the defendant, commanding it at a time certain, under a certain penalty to appear before your Honors, in this Court, then and there to answer truly into this bill of complaint, and to abide by and perform such decree as this Honorable Court may make in the premises.

CARLOS P. GRIFFIN,

Attorney for Plaintiff.

San Francisco, California, December 7, 1921.

[7]

State of California,

City of County of San Francisco,—ss.

Joseph Hotchner, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JOSEPH HOTCHNER.

Subscribed and sworn to before me this 7th day of December, A. D. 1921.

[Seal]

HENRY B. LISTER,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Dec. 7, 1921. Walter B.
Maling, Clerk. [8]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL SIGN SYSTEM ELECTRIC (a Corporation), and TRACY W. SIMPSON, Doing Business as FEDERAL ELECTRIC COMPANY,

Defendants.

Amended Answer.

Now come the above-named defendants, Federal Sign System Electric (a Corporation), and Tracy W. Simpson, doing business as Federal Electric Company, and for answer to plaintiff's bill of complaint, deny, admit and aver as follows:

I.

Answering paragraphs 1 and 3 of the bill of complaint, defendants deny that plaintiff, Joseph Hotchner, was the original, first and sole or any inventor of the improvements in Electric Signs alleged to be described and patented in and by the letters patent in suit, or that the same were not known or used by others before his alleged invention thereof, or had not been in public use or on sale in the United States, or described in any printed publications for more than two years prior to his applications for patents thereon.

II.

Answering paragraphs 2 and 4 of the bill of complaint defendant admits that letter patents No. 1,259,237, dated March 12th, 1918, and No. 1,315,187, dated September 2d, 1919, issued to plaintiff, but deny that there was thereby granted to him, his legal representatives and assigns the exclusive or any right [9] to make, use and vend the improvements in electric signs alleged to be covered thereby.

III.

Answering paragraph 5 of the bill of complaint, defendants are without knowledge as to the truth of the allegations therein contained and call upon plaintiff for full proof thereof.

IV.

Answering paragraph 6 of the bill of complaint, defendants deny that they have at any time, in any manner or respect, infringed upon or made unlawful use of any of the alleged improvements patented in and by the letters patents in suit; and further deny that they have made any gains or profits as the result of any unlawful acts, or that plaintiff has been in any manner damaged or injured by any unlawful acts of defendants.

Without waiving any of the matters and things above set forth, but repeating and insisting upon the same, defendants further answering say:

V.

And for a further and particular defense defendants are informed and believe, and so state the fact to be, that the said alleged invention set forth

in letters patent No. 1,259,237 in suit is neither new nor original and does not possess the quality of invention and that said patent is invalid in all respects.

VI.

And for a further and particular defense defendants state that the said Joseph Hotchner was not the original, or first, or any inventor or discoverer of any material or substantial part of the thing patented in said letters patent No. 1,259,237; and that said invention has been previously patented and described, as hereinafter mentioned, by printed publications and letters patents prior to the supposed invention or discovery thereof by the said Joseph Hotchner as follows, to wit: [10]

UNITED STATES LETTERS PATENT.

Little	32,195	April 30, 1861
Jory	218,750	Aug. 15, 1879
McLewee	328,135	Oct. 13, 1885
Haag	390,777	Oct. 9, 1888
Hotchner	769,138	Aug. 30, 1904
Hotchner	769,139	Aug. 30, 1904
Felkin	822,593	June 5, 1906
Hotchner	844,940	Feb. 19, 1907
Rainaud	845,478	Feb. 26, 1907
Norden	881,943	Mar. 17, 1908
Hotchner	883,682	Mar. 31, 1908
Clark	923,769	June 1, 1909
Ellis	931,188	Aug. 17, 1909
Bock	1,085,530	Jan. 27, 1914
Fisk	1,095,321	May 5, 1914

Gentile	1,103,873	July 14, 1914
Wiley & Hough	1,224,253	May 1, 1917
Slick	1,241,292	Sept. 25, 1917
Sorenson & Wesley	1,258,957	Mar. 12, 1918
Cook	1,269,261	June 11, 1918
Williams	1,279,197	Sept. 17, 1918
Walker	1,304,423	May 20, 1919
Van Bloom	1,311,472	July 29, 1919

FOREIGN PATENTS.

Amy (Great Britain)	10,990	June 16, 1900
Hugues Boldes (France)	335,943	Sept. 17, 1903

VII.

Defendants further answering on information and belief [11] say that prior to the date of application of said Joseph Hotchner patent No. 1,259,237 in suit, and prior to the alleged invention thereof by the said Joseph Hotchner, Electric Signs substantially identical with those which have been and are being manufactured and sold by these defendants and complained of by plaintiff herein, were and have been in public use and on sale in this country and were known to, others, and among those who used or had knowledge of said prior use were the following named persons, firms and corporations, at the places set opposite their respective names:

Prismatic Sign Co., Denver, Colorado;

Brumfield Electric Sign Co., San Francisco, California;

H. P. Beem, Seattle, Washington;

Mr. Wallace, 818 Broadway, Los Angeles, California;

Val Blatz Brewery Co., Butte, Montana;

Mr. Archibald Mackenzie, 1290 Bellaire St., Denver, Colorado;

Paul D. Howse, Los Angeles, California;

Hotel Oregon, Portland, Oregon;

C. E. Heft, 480 Mill St., Portland, Oregon;

Val Blatz Brewing Co., 1519-10th St., Denver, Colorado;

and also others, the names and addresses of which are unknown to these defendants at the present time, but defendants pray leave to set forth by amendment to this amended answer said names and addresses when discovered.

VIII.

And for a further and particular defense defendants are informed and believe, and so state the fact to be, that the said alleged invention set forth in letters patent No. 1,315,187 in suit is neither new nor original and does not possess the quality of invention and that said patent is invalid in all respects. [12]

IX.

Further answering said bill of complaint, and for a further and particular defense, defendants are informed and believe, and so state the fact to be, that the said Joseph Hotchner was not the original, or

first, or any inventor or discoverer of any material or substantial part of the thing patented in said letters patent No. 1,315,187; and that said invention has been previously patented and described, as hereinafter mentioned, by printed publications and letters patents prior to the supposed invention or discovery thereof by the said Joseph Hotchner as follows, to wit:

UNITED STATES LETTERS PATENT.

Butt	706,525	Aug. 12, 1902
Butt	707,205	Aug. 19, 1902
Sawyer	827,943	Aug. 7, 1906
Fortmann	1,070,028	Aug. 12, 1913
Anway	1,099,633	June 9, 1914
Abeles	1,155,294	Sept. 28, 1915
Smith	1,194,559	Aug. 15, 1916
Dixon	1,207,721	Dec. 12, 1916
Dye & Clark	1,211,115	Jan. 2, 1917
Gruman	1,274,875	Aug. 6, 1918
Raul & Springer	1,301,741	April 22, 1919
Wilde & Wimmermark	1,314,626	Sept. 2, 1919

and also:

City Ordinance No. 21,308 of City of Seattle,
Washington, approved July 8th, 1909.

X.

Defendants further answering on information and belief say that prior to the date of application of said Joseph Hotchner [13] patent No. 1,315,187 in suit, and prior to the alleged invention thereof by the said Joseph Hotchner, Electric Signs

substantially identical with those which have been and are being manufactured and sold by these defendants and complained of by plaintiff herein, were and have been in public use and on sale in this country and were known to others, and among those who used or had knowledge of said prior use were the following named persons, firms and corporations, at the places set opposite their respective names:

Prismatic Sign Co., Denver, Colorado;

Brumfield Electric Sign Co., San Francisco, California;

H. P. Beem, Seattle, Washington;

Mr. Wallace, 818 Broadway, Los Angeles, California;

Val Blatz Brewery Co., Butte, Montana;

Mr. Mackenzie, Denver, Colorado;

Paul D. Howse, Los Angeles, California;

and also others, the names and addresses of which are at present unknown to these defendants and which, when discovered, these defendants pray leave to insert by amendment to this amended answer.

WHEREFORE, and for the cause aforesaid, these defendants deny the equity of plaintiff's bill herein and all manner of wrongful and unlawful acts wherewith, in the said bill of complaint, these defendants are charged, and further deny the right of plaintiff to the relief or any part thereof alleged against these defendants in said bill of complaint and submit that they should not be compelled to

make any other or further answer than that herein contained.

All of which matter and things these defendants are ready and willing to aver, maintain and prove as this Honorable [14] Court shall direct, and humbly pray to be hence dismissed with their reasonable costs in this behalf.

FEDERAL SIGN SYSTEM ELECTRIC
(a Corporation), and TRACY W.
SIMPSON, Doing Business as Federal
Electric Company.

By TRACY W. SIMPSON,
One of the Defendants.

CHAS. E. TOWNSEND,
WM. A. LOFTUS,
Attorneys for Defendants.

Service of copy of the within admitted this 22d
day of January, A. D. 1921.

CARLOS P. GRIFFIN,
For Plaintiff.

[Endorsed]: Filed Jan. 22, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

In the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL SIGN SYSTEM ELECTRIC, a Corporation, and TRACY W. SIMPSON, Doing Business as FEDERAL ELECTRIC COMPANY,

Defendants.

Final Decree Dismissing Bill of Complaint.

This cause having come on to be heard upon the pleadings, proceedings and proofs herein taken and filed on behalf of both parties, and after due proceedings had, it is, upon consideration, ORDERED, ADJUDGED and DECREED as follows:

I.

That the Hotchner patent No. 1,259,237, issued July 30th, 1918, sued on, and particularly with respect to claim 4, is void and the bill is dismissed as to this patent.

II.

That the Hotchner patent No. 1,315,187, issued September 2d, 1919, sued on, and particularly with respect to claims 1, 2 and 3, is void and the bill is dismissed as to this patent.

III.

That the said Hotchner patents No. 1,259,237,

issued July 30th, 1918, and No. 1,315,187, issued September 2d, 1919, even if valid, are neither of them infringed and the bill is dismissed as to each of said patents.

IV.

That the defendants do recover of the plaintiff their costs and disbursements of this suit to be taxed by the Clerk in accordance with the Rules of this Court.

FRANK H. RUDKIN,

Judge.

Dated: December 9th, 1921. [16]

[Endorsed]: Filed and entered Dec. 9, 1921.
W. B. Maling, Clerk. By J. A. Schaertzer, Deputy
Clerk. [17]

In the United States District Court in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Complainant,

vs.

R. E. MORGAN, and P. C. LONG, Doing Business
as the AMERICAN ELECTRIC SIGN
COMPANY.

Bill of Complaint.

To the Honorable the Judges of the District Court
of the United States in and for the Northern
District of the State of California, in Chan-
cery Sitting:

Joseph Hotchner, residing in the State of California, and a citizen of the State of California, brings this his bill of complaint against R. E. Morgan and P. C. Long, believed to be citizens of the State of California, and believed to be copartners doing business under the name American Electric Sign Company, in the State of California, at San Francisco.

1. And thereupon your orator complains, alleges and avers that on or before the 19th day of October, 1914, your orator was the original, first and sole inventor of a certain new and useful improvement in illuminated signs, not known or used by others before his said invention thereof, and which had not at the time of his application for a patent thereon been in public use or on sale with his consent or allowance for a period of more than two years prior to October 19, 1914, upon which date your orator did file an application for patent thereon in the United States Patent Office at Washington, D. C.

2. Your orator further alleges and avers that being so the inventor of said improvement in electric signs, after [18] due proceedings had upon the patent application aforesaid, the Commissioner of Patents thereafter allowed said patent, and after your orator had duly complied in all respects with the conditions and requisitions of the laws in such cases provided, and upon the payment of the fees prescribed, the Commissioner of Patents did issue letters patent of the United States for said improvement and invention in illuminated signs, under the seal of the Patent Office, duly signed by the Commis-

sioner of Patents, or his Assistant, acting for him, and bearing date of July 30, 1918, under the Number 1,259,237, and said letters patent were thereafter delivered to your orator whereby was granted and secured to him, his heirs and assigns, for the term of seventeen years from the date thereof, the full and exclusive right of making, using and vending to others to be used, said improvement and invention, a description whereof is given in the specification forming a part of said patent grant, and which patent or a certified copy thereof is hereby preferred for the inspection of this Honorable Court.

3. And your orator alleges and avers that the said improvements, patented as aforesaid, have hitherto been in his exclusive possession being manufactured for him in the Pacific Coast territory by the Novelty Electric Sign Company, his duly accredited licensee, and have been introduced by said licensee into wide use, and said signs, made in accordance with the disclosure of said patent, have proved to be valuable to the public and have been and still are of great value to your orator by reason of the license fees paid to him by his licensee, the Novelty Electric Sign Company. That your orator has expended large sums of money in developing and introducing into use said electric signs, and that the public has generally acquiesced in his exclusive rights and privileges secured by said patent, [19] and that for the infringement herein complained of, your orator would now be in undis-

turbed possession and enjoyment of the exclusive rights and privileges secured to him by said patent.

4. Your orator further shows that the said defendant, and each of them, as your orator is informed and believes, well knowing the premises, without right or authority, and in violation of your orator's said rights under the patent aforesaid, have, within the Northern District of the State of California and since the issue and during the term of said letters patent made or caused to be made for use, and have vended to others to be used, a number of electric signs made in accordance with the disclosure of said patent and the claims thereof, but how many your orator cannot state more than to say that one such sign has been made and sold by the defendants and has been installed at the Northeast corner of Fillmore and Ellis Streets, in the State of California, with the reading, "LUNCH," thereon. Your orator prays that the defendants may be compelled to discover and disclose the number of such signs made by them, which contain substantially the improvements so patented, to your orator, as covered by the letters patent as aforesaid. Your orator further alleges and avers that defendants persist in the making and selling of said patented illuminated signs, though warned in writing to desist, and are now making or causing to be made for sale and use, and are now selling to be used and threatens to continue to make and vend to be used, illuminated signs containing said patented improvements or material parts thereof. And your orator further fears that defend-

ants will continue such infringement upon his exclusive rights in the future, whereby great gains and profits, heretofore accruing to your orator, will accrue to defendants, or either of them, which in equity belong to your orator. And your orator has sustained damages [20] by reason of said violation of his rights, and will sustain further damages if said infringement be not restrained.

To the end, therefore, that said defendants may, if they can, show why your orator should not have the relief herein prayed, and may, and according to the best of their knowledge, remembrance, information and belief, but not under oath, answer under oath being expressly waived, full, true, direct and perfect answer make to all and singular the premises, and that defendants may be decreed to account for, and pray over to your orator all gains and profits realized by them, or either of them, from the unlawful using, making or vending of the improvements vested in your orator under the patent aforesaid; and in addition thereto, the damages sustained by your orator by reason of such infringement, to be assessed by or under the direction of your Honors; and that your Honors may increase the actual damages to three times the amount of such assessment under the circumstances of the wilful and unjust infringement by said defendants, and that defendants may be perpetually restrained by an injunction issuing out of this Honorable Court, for making, using or vending illuminated signs containing the improvements secured to your orator under said patent, and that your orator have such

other or further relief as equity may deem just, together with the costs of this action.

May it please your Honors to grant your orator not only a writ of injunction, conformable to the prayer of this bill, but also an injunction *pendente lite*, and also a writ of subpoena, directed to the defendants, and each of them, commanding them at a time certain, under a certain penalty, to appear before your Honors, in this court, then and there to answer truly unto this bill of complaint, and to abide by and perform such decree as this Honorable Court may make in the premises.

CARLOS P. GRIFFIN,

Solicitor and Counsel for Joseph Hotchner. [21]

Jan. 22, 1920.

State of California,

City and County of San Francisco,—ss.

Joseph Hotchner, being duly sworn, deposes and says: That he is the complainant in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

JOSEPH HOTCHNER.

Subscribed and sworn to before me this 22d day of January, A. D. 1920.

[Seal]

HENRY B. LISTER,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 23, 1920. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[22]

In the United States District Court for the North-
ern District of California, Second Division.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

Second Amended Answer.

Come now R. E. Morgan and P. C. Long, defend-
ants in the above-entitled action, and by leave of
Court having first been obtained, file this, their sec-
ond amended answer to the bill of complaint now
on file herein, and for answer to plaintiff's bill of
complaint deny, admit and aver as follows:

I.

Answering paragraph 1 of the bill of complaint
defendants deny that on or before the 19th day of Oc-
tober, 1914, or at any other time, or at all, was Joseph
Hotchner, the complainant in said action, the origi-
nal or the first or the sole inventor of the alleged
improvement of the illuminated sign referred to in
paragraph 1 of his said bill of complaint, and deny
that before said 19th day of October the said alleged
invention was not known or used by others than
said Joseph Hotchner, and deny that before the

said 19th day of October, 1914, the said alleged improvement in illuminated signs had not been in public use or on sale by others than said Joseph Hotchner, and without his consent or allowance.

II.

Answering paragraph II of the bill of complaint these defendants further deny that said Joseph Hotchner is the inventor of said alleged improvement and deny that under the letters patent [23] referred to in paragraph II of said bill of complaint the said complainant was granted and secured for any firm whatever, the full and exclusive or any right of making or using or vending the alleged improvement or invention referred to in said bill; and deny that said letters patent cover any new or useful improvement or invention whatever in illuminated signs, but on the contrary assert and allege that the improvement and invention referred to in said letters patent and disclosed in the claims thereof, were and are not in fact either an improvement upon any device in common and public use theretofore in manufacture of illuminated signs, or constitutes in anywise an invention in illuminated signs.

III.

As to the allegations contained in paragraph III of said bill of complaint, these defendants are without knowledge as to the truth or falsity of the same and placing their denial upon said grounds, they deny each and every of the allegations in said paragraph III contained.

IV.

Answering paragraph IV of the bill of complaint these defendants deny that within the Northern District of the State of California, or elsewhere, or at all, has either of them since the issue of the letters patent referred to in the said bill of complaint caused to be made for use or have sold to others to be used, any electric sign made or sold in violation of any right or authority of the complainant in the premises or in violation of any right or authority of the complainant under the patent referred to in said bill, and your defendants further allege that they have no intention to infringe upon any exclusive rights of said complainant under the patent referred to in the complaint or otherwise in their business of manufacturing and selling electric [24] signs; and they further allege and assert that any and all signs made by them or sold by them are free of any infringement whatever upon any improvement or invention made or owned or controlled by said complainant under any patent whatever or otherwise, and deny that the said complainant is entitled to the control or ownership of any device or improvement or invention as referred to or covered or disclosed in said patent or in the claims or specifications thereof, and deny that said complainant has been damaged at all or will be damaged at all by any act by these defendants or either of them.

Without waiving any of the matters and things above set forth, but repeating and insisting upon the same, defendants further answering say:

V.

And for a further and particular defense defendants are informed and believe, and so state the fact to be, that the said alleged invention set forth in letters patent No. 1,259,237 in suit is neither new nor original and does not possess the quality of invention and that said patent is invalid in all respects.

VI.

And for a further and particular defense defendants state that the said Joseph Hotchner was not the original, or first or any inventor or discoverer of any material or substantial part of the thing patented in said letters patent No. 1,259,237; and that said invention has been previously patented and described, as hereinbefore mentioned, by printed publications and letters patent prior to the supposed invention or discovery thereof by the said Joseph Hotchner as follows, to wit: [25]

UNITED STATES LETTERS PATENT

Little	32,195	April	30, 1861
Jory	218,750	Aug.	15, 1879
McLewee	328,135	Oct.	13, 1885
Haag	390,777	Oct.	9, 1888
Hotchner	769,138	Aug.	30, 1904
Hotchner	769,139	Aug.	30, 1904
Felkin	822,593	June	5, 1906
Hotchner	844,940	Feb.	19, 1907
Rainaud	845,478	Feb.	26, 1907
Norden	881,943	March	17, 1908
Hotchner	883,682	March	31, 1908
Clark	923,769	June	1, 1909

Ellis	931,188	Aug.	17, 1909
Bock	1,085,530	Jan.	27, 1914
Fisk	1,095,321	May	5, 1914
Gentile	1,103,873	July	14, 1914
Wiley & Hough	1,224,253	May	1, 1917
Slick	1,241,292	Sept.	25, 1917
Sorenson & Wesley	1,258,957	March	12, 1918
Cook	1,269,261	June	11, 1918
Williams	1,279,197	Sept.	17, 1918
Walker	1,304,423	May	20, 1919
Van Bloom	1,311,472	July	29, 1919

FOREIGN PATENTS

Amy (Great Britain)	10,990	June	16, 1900
Hugues Boldes (France)	335,943	Sept.	17, 1903

VII.

Defendants further answering on information and belief say that prior to the date of application of said Joseph Hotchner [26] patent No. 1,259,237 in suit, and prior to the alleged invention thereof by the said Joseph Hotchner, Electric Signs substantially identical with those which have been and are being manufactured and sold by these defendants and complained of by plaintiff herein, were and have been in public use and on sale in this country and were known to others, and among those who used or had knowledge of said prior use were the following named persons, firms and corporations, at the places set opposite their respective names:

Prismatic Sign Co., Denver, Colorado;
Brumfield Electric Sign Co., San Francisco, California;

H. P. Beem, Seattle, Washington;

Mr. Wallace, 818 Broadway, Los Angeles, California;

Val Blatz Brewery Co., Butte, Montana;

Mr. Archibald Mackenzie, 1290 Bellaire St., Denver, Colorado;

Paul D. Howse, Los Angeles, California;

Hotel Oregon, Portland, Oregon;

C. E. Heft, 480 Mill St., Portland, Oregon;

Val Blatz Brewing Co., 1519-10th St., Denver, Colorado;

and also others, the names and addresses of which are unknown to these defendants at the present time, but defendants pray leave to set forth by amendment to this second amended answer said names and addresses when discovered.

WHEREFORE, and for cause aforesaid, these defendants deny the equity of plaintiff's bill herein and all manner of wrongful and unlawful acts wherewith, in the said bill of complaint, these defendants are charged, and further deny the right of plaintiff to the relief or any part thereof alleged against these defendants in said bill of complaint and submit that they should not be compelled to make any other or further answer than [27] that herein contained.

All of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly

pray to be hence dismissed with their reasonable costs in this behalf.

R. E. MORGAN,

P. C. LONG,

By CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys and Solicitors for Defendants.

Service of copy of the within admitted this 22d day of January, A. D. 1921.

CARLOS P. GRIFFIN,

For Plaintiff.

[Endorsed]: Filed Jan. 22, 1921. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[28]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. G. LONG,

Defendants.

Final Decree Dismissing Bill of Complaint.

This cause having come on to be heard upon the pleadings, proceedings and proof herein taken and filed on behalf of both parties, and after due proceedings had, it is, upon consideration, ORDERED, ADJUDGED and DECREED as follows:

I.

That the Hotchner patent No. 1,259,237, issued July 30th, 1918, sued on, and particularly with respect to claim 4, is void and the bill is dismissed as to this patent.

II.

That the said Hotchner patent No. 1,259,237, issued July 30th, 1918, even if valid, is not infringed and the bill is dismissed.

III.

That the defendants recover of the plaintiff their costs and disbursements of this suit to be taxed by the clerk in accordance with the Rules of this court.

Dated December 9th, 1921.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed and entered Dec. 9, 1921.
W. B. Maling, Clerk. By J. A. Schaertzer, Deputy
Clerk. [29]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

and

CONSOLIDATED.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL SIGN SYSTEM ELECTRIC and
TRACY W. SIMPSON, Doing Business as
the FEDERAL ELECTRIC COMPANY,
Defendants.

Statement of Evidence.

Tuesday, December 6, 1921.

COUNSEL APPEARING:

For Plaintiff: CARLOS P. GRIFFIN, Esq.

For Defendants: CHARLES E. TOWNSEND,
Esq., and WM. A. LOFTUS, Esq.

Depositions in this case may be read with the same effect in both cases, and the two cases tried together.

The COURT.—The statement was made the other day that only one case would be tried and the decision in one case would follow in the other. You may proceed with the trial; I don't care how you try them.

Mr. GRIFFIN.—It is consented that they be consolidated for the purpose of trial.

We will show, in this connection, that the defendant Long made a sign and installed the same in the city and county, and the [30] defendant Federal Electric Sign System installed a similar sign, in

which the two patents were used conjointly, that being in Oakland.

The COURT.—Is the validity of the patent in question, or is there simply a denial of infringement?

Mr. GRIFFIN.—There were a number of public uses set up and sundry patents are set up, both for the purpose of denying validity, I assume, and also, possibly, the defense of noninfringement will be urged.

Statement by Mr. Loftus during which it was stated:

“If Hotchner contends that his patent is so broad as to cover the use of a row of lights placed on the bottom of an electric sign to illuminate the sidewalk, then we are prepared to show that that patent is invalid.”

The COURT.—You will not have to show that. They might as well claim a patent on a street lamp.

Mr. GRIFFIN.—I would like to say to your Honor that, in looking over the complaint. I discovered there was a mistake in alleging the date of this later patent, that is, alleging its filing date to be September 2, 1919; through an error, or oversight, that date came into the filing date. The filing date should have been October 19, 1914.

That is in the complaint against the Federal Sign System.

Stipulation that the usual printed copies of United States patents may be used without certification.

Deposition of Joseph Hotchner, for Plaintiff.

Thereupon plaintiff called JOSEPH HOTCHNER, who testified as follows:

My name is Joseph Hotchner. I am 54 years old. I live at 1263 Vallejo Street, San Francisco. I am a manufacturer of electric signs since 1891 in Providence, Rhode Island, in New York, and in San Francisco. I am the plaintiff in the case of Hotchner vs. Federal Electric Sign System and also against Morgan and Long. I am the applicant and patentee of the two patents in suit, being [31] Hotchner No. 1,259,237, dated March 12th, 1918, on an application filed October 19th, 1914, and Hotchner patent No. 1,315,187, dated September 2d, 1919, on an application filed October 19th, 1914.

Mr. GRIFFIN.—We are going to undertake to prove infringement in one case, in respect to claim 4 of the defendant's patent, and in respect to claims 1, 2 and 3 of the second patent.

(The documents were here marked, respectively, Plaintiff's Exhibits 1 and 2.)

Mr. GRIFFIN.—I wish to ask the witness what he did in respect to the making of the inventions disclosed in the patent.

Mr. TOWNSEND.—That calls for a conclusion, your honor.

The COURT.—The patent is *prima facie* evidence, isn't it, that he is at least the inventor?

Mr. TOWNSEND.—Yes, your Honor.

The COURT.—I don't think it is necessary to prove that until it is controverted in some way by the other side.

(Deposition of Joseph Hotchner.)

Mr. GRIFFIN.—Very well, your Honor.

Q. Did you ever make any electric signs in accordance with the disclosure of either of these patents? A. I did.

Mr. TOWNSEND.—Just a moment. That is objected to, your Honor, as calling for the conclusion of the witness.

The COURT.—The answer may stand.

Mr. GRIFFIN.—Q. About how many?

A. I could not tell that, I made thousands of them.

Q. Were the signs marked in accordance with the law?

A. They were.

Has that business proven profitable to you?

A. It has.

Mr. TOWNSEND.—That is objected to, your Honor, as immaterial, irrelevant and incompetent.

The COURT.—That is one element tending to show invention. I don't care to go into it to any extent, though. You may proceed.

Mr. GRIFFIN.—Q. Aside from the infringement here [32] complained of, have there been any other infringements of this patent, to your knowledge?

Mr. TOWNSEND.—We object to that as leading and calling for a conclusion.

The COURT.—That calls for a conclusion; I will sustain the objection.

Mr. GRIFFIN.—If your Honor please, in this case it is alleged that these are the only cases that

(Deposition of Joseph Hotchner.)

the patent has not been infringed otherwise than by these defendants.

The COURT.—But you are asking this witness to determine the very question involved here, as to whether or not there has been an infringement of his patent.

Mr. GRIFFIN.—No, your Honor. I am asking him, have there been any other infringements that he knows of than the infringements here complained of.

The COURT.—You are asking him to determine what would constitute an infringement. Objection sustained.

Mr. GRIFFIN.—Q. Will you state the nature of the sign that you complain of in this case that you claim was erected by the defendants, Morgan and Long, and where that sign was erected?

Mr. TOWNSEND.—If your Honor please, if he has the sign itself, that is the best evidence.

The COURT.—Is the sign here?

Mr. GRIFFIN.—The sign is not here, your Honor, but I have photographs of it.

The COURT.—Submit the photographs.

Mr. GRIFFIN.—I wish to have the record clear as to the verbal description of the sign, so that if the matter comes before other courts, there may be a verbal description of the sign in the record.

Mr. LOFTUS.—There is no foundation laid for this [33] question. We don't know whether he has any information concerning the sign.

Mr. GRIFFIN.—Q. Do you know anything about

(Deposition of Joseph Hotchner.)

the sign which is complained of in respect to the defendant Morgan & Long? A. I do.

The COURT.—It seems to me that a very good photograph, or a model, would be the very best evidence as to the form of the structure. If he can describe it better than the photograph shows it, he can proceed, but I doubt that very much. Let me see the photograph you have.

Mr. GRIFFIN.—Yes, your Honor.

The COURT.—Submit it to council on the other side.

Mr. TOWNSEND.—Of course, we do not admit, your Honor, that this discloses a structure which is apparent from the photograph itself.

The COURT.—It is correct as far as it goes, isn't it?

Mr. TOWNSEND.—As far as we know.

Mr. GRIFFIN.—I will offer these two photographs in evidence after they have been identified.

The COURT.—It seems to me the only way to try a patent case of any importance is to have models of the different types, so that the Court can see what the difference is.

Mr. GRIFFIN.—We can't very well take the other man's sign down. It is over on Fillmore street. The best we can do is to provide a photograph and give a verbal description.

The COURT.—Proceed.

Mr. GRIFFIN.—Q. I show you two photographs, and ask you if you can identify them? A. Yes.

Q. What are they? A. This is the sign that is—

(Deposition of Joseph Hotchner.)

Mr. TOWNSEND.—We object because there is no proper foundation laid. This man did not take the photograph, so far as we know.

The COURT.—He can tell whether it is a correct representation, or not. [34]

A. (Continuing.) I have seen the sign.

Mr. GRIFFIN.—Q. Is this photograph a correct representation of the sign as made there?

A. It is.

Q. Do you know who erected the sign?

A. Morgan & Long.

Mr. TOWNSEND.—Now, your Honor, he must be speaking from hearsay.

The COURT.—Does that relate to a matter over which there is any controversy? Do you deny this sign?

Mr. TOWNSEND.—We don't know anything about this particular sign.

Mr. GRIFFIN.—I will offer these in evidence and ask to have them marked.

Mr. TOWNSEND.—We object to them because no proper foundation has been laid.

The COURT.—I will admit them.

(The photographs were here marked, respectively, Plaintiff's Exhibits 3 and 4.)

Mr. GRIFFIN.—Have you examined this sign carefully? A. I have.

Q. Have you examined the letters? A. I have.

Q. Will you state to the Court how these letters are made?

A. The letters are soldered on a raised outline all

(Deposition of Joseph Hotchner.)

around the elements of the letter.

Q. What forms the letter?

A. The raised outline forms the letter.

Q. And through the body of the sign, how does the light escape?

Mr. TOWNSEND.—If your Honor please, the sign, itself, would be the best evidence. He is getting at the internal construction. The photograph can only speak of the external appearance.

The COURT.—He is asking him what he discovered upon an examination of it. The sign may be better than oral testimony, but is is not the only evidence. Objection overruled. [35]

Mr. GRIFFIN.—Q. Will you state how the interior of the sign is constructed?

A. There are lamps placed within the interior on elements, any kind of means, on a strip; sockets are put in, wired up, lamps are placed in the sockets, and the light escapes through the glass.

The COURT.—This is on the question of infringement of the raised letter?

Mr. GRIFFIN.—Yes, sir.

The COURT.—It seems to me counsel can agree in a few minutes as to just what the defendant has done.

Mr. LOFTUS.—We are not ready to try this case, your Honor. I don't even know where these defendants are now. They are no longer in business. That is why I wanted this case to abide the decision of the other.

The WITNESS.—They are in business.

(Deposition of Joseph Hotchner.)

Mr. GRIFFIN.—Q. Do you know whether these defendants are now in business?

A. They are.

Q. Where?

A. On Eddy Street, between Pierce and the next street, whatever the name of it is; between Pierce and Scott Street.

Q. In this city and county?

A. In this city and county, on Eddy street.

Q. Now, with respect to the other one, I will show you two photographs and ask you if you can identify them. A. Yes, sir.

Mr. GRIFFIN.—I will ask to have these photographs admitted as Plaintiff's Exhibits 5 and 6.

(The documents were here marked Plaintiff's Exhibit 5 and Plaintiff's Exhibit 6.)

Q. Have you seen the signs purported to be shown in these photographs? A. Yes.

Q. Where are they?

A. They were over at Eleventh and Broadway, in Oakland. [36]

Q. Are these photographs correct representations of those signs? A. Yes, sir.

Q. Will you state how each one of these signs is constructed; did you examine both of these signs?

A. I did.

Q. Carefully?

A. I went up on a ladder to look at it.

Q. Look at the sign, "Normal Pharmacy," will you state how that is constructed?

(Deposition of Joseph Hotchner.)

A. It has a raised molding soldered all around the elements of the letter.

Q. How is it illuminated?

A. Illuminated by means of lights within the interior of the box.

Q. How does the light escape?

A. The light escapes through the glass within the center of the elements of the letter.

Q. Has this sign other lamps?

A. It has lamps underneath it, in what we call the illuminator, to light up the sidewalk or front of the building.

Q. Referring now to the photograph, Plaintiff's Exhibit 5, will you describe the lamp shown in the lower portion?

A. This is the lamp in the lower portion of the sign, wherein the lights are embedded in that reflector, and is built exactly like ours.

Mr. TOWNSEND.—Mr. Griffin, I understand that in regard to Exhibit 5, referring to the "Harry Rose, Haberdasher," you make no charge of infringement concerning the sign, the front portion, which has the words, "Harry Rose, Haberdasher"?

Mr. GRIFFIN.—No, except inasmuch as the lamps used for illuminating the sidewalk are in the position described in claims 1, 2 and 3 of the 1919 patent, and that the use of these particular letters in conjunction with that means for illuminating the sidewalk is an infringement.

Mr. TOWNSEND.—In other words, I understand from you that your charge of infringement

(Deposition of Joseph Hotchner.)

relates only to the lower row of lamps in the bottom of the sign, inclosed in this trough, and that you make [37] no claim of infringement as to this illuminated sign, "Harry Rose, Haberdasher."

Mr. GRIFFIN.—That is not correct.

Mr. TOWNSEND.—You have no charge of infringement in relation to this front portion of the sign.

Mr. GRIFFIN.—Yes, there is a charge of infringement in respect to that, and I will explain it to you.

Mr. TOWNSEND.—Which patent does that infringe, the words, "Harry Rose, Haberdasher"? We want it perfectly clear.

Mr. GRIFFIN.—The charge of infringement is made in respect to the sign shown in Plaintiff's Exhibit No. 5, that the lamps illuminating the sidewalk in conjunction with the letters of this sign are an infringement of claims 1, 2 and 3 of the 1919 patent, although no charge of infringement is made as to those letters separately.

Mr. TOWNSEND.—In other words, there is no infringement in that sign of the first Hotchner patent.

Mr. GRIFFIN.—No.

The WITNESS.—Yes, there is.

Mr. GRIFFIN.—Just a moment.

Q. What is the situation as to the two signs shown here with respect to each other, and what is the relation of this series of sidewalk illuminating lamps with respect to these two signs.

(Deposition of Joseph Hotchner.)

A. I don't understand your question.

Q. I am referring to exhibits 5 and 6.

A. The one sign is the patented sign which is known here at the present time as the first patent, and within that sign is embedded that illuminator to light up the front and the sidewalk, which is described in my second patent here—

The COURT.—Do I understand the illuminating device used by the defendant, or the defendants here, is entirely below the frame?

Mr. GRIFFIN.—No, your Honor.

Mr. LOFTUS.—It is within the very bottom, but below the letters on the sign. [38]

Mr. GRIFFIN.—It is similar to Figure 2 of the first patent.

Q. At the place where these signs are installed, how many signs are there having this illuminating effect from the lower portion of the body of the sign?

A. 6, 7 or 8. I have a picture there showing them all on the street.

Q. I will show you another photograph and ask you if you can identify it? A. Yes.

Mr. GRIFFIN.—I offer this photograph in evidence and ask that it be marked Plaintiff's Exhibit 7.

Mr. TOWNSEND.—What is the purpose of this particular photograph?

Mr. GRIFFIN.—The purpose is to show that all of these signs are an infringement of the second patent.

(Deposition of Joseph Hotchner.)

Mr. TOWNSEND.—You only claim that the second patent is infringed by signs in that photograph?

Mr. GRIFFIN.—Yes, all of them.

Mr. TOWNSEND.—I say, do you only claim that the second patent is infringed?

Mr. GRIFFIN.—Yes, the second patent.

(The photograph was marked Plaintiff's Exhibit 7.)

Q. What is this photograph?

A. This photograph shows the various signs put up on that building for the different concerns. The first photograph, to the left, is the "Normal Pharmacy," which was made, as I described here before, with the letters raised up, soldered on with a molding around the elements of the letter, the bottom has the illuminator lighting up the front and the sidewalk. The other photographs have the illuminators each lighting up the front of the sidewalk.

Q. Is that photograph a correct representation of the signs in Oakland you have spoken of?

A. Yes, sir.

Q. And did you say that all of those signs had the lights in [39] the lower portion for the illumination of the sidewalk? A. Yes, sir.

Q. Is there any light from the interior signs that goes through the letters after being reflected from the reflectors for the sidewalk lamps?

Mr. TOWNSEND.—That is objected to as leading. We want to know what his construction is. We want to see what the bases for his opinion are. That question is grossly leading.

(Deposition of Joseph Hotchner.)

Mr. GRIFFIN.—I will withdraw it.

Q. Will you state the interior construction of the signs with respect to the illumination of the letters and the illumination of the sidewalk?

A. There are sockets placed within the interior of these boxes, they are wired up, lamps are put in, and the light escapes through the center portion of the letter, within the elements of the letter. There is a reflector within it which is built up by this sidewalk light; the light is thrown down between the two sides of the reflector, and goes right through the elements of the letter.

Mr. TOWNSEND.—We object to the last portion of the answer as calling for an opinion. He should introduce structures on which he bases his opinion. We ought to know what these statements are based on.

Mr. GRIFFIN.—Q. Did you examine the letters that were in those signs? A. I did.

Q. How did you do so?

A. I went up on a ladder.

Q. Did you look inside the signs?

A. You can't look inside of the sign.

Mr. TOWNSEND.—I move that the testimony in regard to the interior be stricken out.

The COURT.—The opinion will not hurt anybody in view of his statement. [40]

Mr. GRIFFIN.—Q. Is it possible for you to tell anything from the exterior of the sign as to the interior construction? A. Certainly.

(Deposition of Joseph Hotchner.)

Mr. LOFTUS.—I object to that as calling for a conclusion.

The COURT.—You may ask him for his reason, if you like. Proceed.

Mr. GRIFFIN.—Q. How are these signs made in respect to the kind of metal, and so on?

A. They are made out of galvanized iron, the same as all signs are made.

Cross-examination.

Mr. LOFTUS.—Q. Did you take any measurements of those signs that are shown in this photograph, exhibit 7? A. What measurements?

Q. The interior dimensions of the signs.

A. No, I didn't take any measurements of the interior.

Q. Do you know who erected those signs?

A. I do.

Q. Who erected them?

A. The Federal Sign Company.

Q. Is that the full name of the company?

A. You never can tell just who is erecting them; there are several companies in the Federal, some are called Federal Electric Company, some are called Federal Sign System. They just put on "Federal."

Q. You don't know which company erected this particular sign?

A. No, I don't know which company, whether it is the Federal Sign System, or the Federal Electric Company.

(Deposition of Joseph Hotchner.)

Q. What is the Federal Electric Company, a corporation? A. I so understand.

Q. What is the Federal Sign System?

A. A corporation.

Q. You stated that you made no measurements of the interior of these signs. Did you make any measurements of the exterior? A. No.

Q. You *don't* the height of the letters?

A. No, I do not. [41]

Q. You don't know the depth of the trough, the bottom reflector, do you?

A. Yes, it is about 6 inches deep.

Q. Did you measure it?

A. No, I didn't. I don't have to measure a little 'hing like that, you can tell by your eye.

Q. You guess at it? A. Yes.

Q. And you didn't examine the interior of the sign?

A. The exterior building of the sign—

Q. Just a moment; I say, you didn't examine the interior of the sign? A. No, sir.

Q. Did you measure the distance between the bottom of the letters at each side of the sign, the bottom line of letters reading, "Normal Pharmacy," did you measure the distance between that bottom line and the lowermost reflector which illuminates the sidewalk? A. No, I did not.

Deposition of Joseph A. Meeks, for Plaintiff.

Plaintiff thereupon called JOSEPH A. MEEKS, who testified as follows:

I am 55 years old. My residence is 499 Evergreen Avenue, Daly City, I am a sign manufacturer; have been so engaged 23 years. I have examined the signs, exhibits 3 and 4 purport to represent. The sign is located on Ellis Street, corner Fillmore. The photographs are correct representations of the sign. The sign is constructed of a raised metal portion soldered around the element of the letter, with a white glass set in back. The lamps are so constructed to shine through the glass and illuminate the letter. I recognize the sign shown in Plaintiff's Exhibits 5, 6 and 7. I have seen them. The "Normal Pharmacy" is located at 11th & Broadway, Oakland. The other signs are located on Broadway, adjoining the drug sign. I examined the sign from the outside. The sign is formed on the outside by means of metal, soldered around, with glass in back of it. [42]

Mr. GRIFFIN.—Q. How is it illuminated?

A. Illuminated from the inside.

Q. With respect to the lower portion of the sign, how about that?

A. The lower portion of the sign has a reflector to throw the light down in front of the building and on the sidewalk.

Q. Do you know who erected those signs?

A. Manufactured by the Federal; their imprint is on them.

(Deposition of Joseph A. Meeks.)

Q. The Federal what? A. The Federal Sign Company or the Federal Electric Company, I don't know which, but I know it is the Federal.

Q. Do you know who erected the sign shown in Plaintiff's Exhibit 3?

A. The Morgan Sign Company.

Q. Who does that consist of?

A. Mr. Long is one of the partners.

Q. He is one of the defendants herein?

A. Yes, sir.

Cross-examination.

Mr. LOFTUS.—Q. You are connected with the Novelty Sign Company? A. Yes, sir.

Q. Is Mr. Hotchner connected with that company? A. Yes, sir.

Q. What is his position in the company?

A. He is the president and general manager.

Q. What is your position?

A. I am superintendent and foreman of the shop.

Q. He is your employer? A. Yes, sir.

Q. In regard to your information as to who erected the signs shown in exhibits 3 and 4, in what way did you get that information?

A. In regard to the erection?

Q. Yes, how did you learn who erected the sign shown in these exhibits?

A. By the imprint on the sign.

Q. That is the only information you have?

A. Yes, sir.

(Deposition of Joseph A. Meeks.)

Q. And, similarly, in regard to exhibits 5, 6, and 7 shown here, where did you receive your information as to who erected those signs? [43]

A. I don't think I testified as to who actually erected them.

Q. You mentioned the name "Federal," didn't you? A. Yes, sir.

Q. Where did you receive that information?

A. The imprint on the sign.

The COURT.—Q. Your information in all cases was derived from the imprint on the sign?

A. Yes; of course, we don't see the man putting it up.

Mr. LOFTUS.—Q. And you didn't make any other inquiries? A. No.

Mr. TOWNSEND.—We move that this witness' testimony in regard to the origin of exhibits 4 and 5, the signs represented by those photographs, be stricken out as based on hearsay.

The COURT.—The testimony will stand for what it is worth; I don't know that it is worth anything.

Mr. LOFTUS.—That is all.

**Deposition of Joseph Hotchner, for Plaintiff
(Recalled).**

JOSEPH HOTCHNER, recalled for plaintiff.

Mr. GRIFFIN.—Q. Did you make any inquiry of any of the store managers over there as to who erected the sign?

(Deposition of Joseph Hotchner.)

Mr. TOWNSEND.—That is immaterial, and calling for hearsay testimony.

The COURT.—He may answer it “Yes” or “No.”

A. Yes.

Mr. GRIFFIN.—Q. What happened as a result of that inquiry?

A. The man showed me the bill—

Mr. TOWNSEND.—I object to that as hearsay.

A. When I was here on the stand before, just a few minutes ago, your Honor, I didn't remember this incident, but when I went back to my seat I remembered that I went inside, and I spoke to the [44] owner, and he took me over to his other store at Eighth and Washington, and he showed me the bill. I knew exactly how much he paid for it, and I saw the billhead of the Federal Electric Company. I forgot that when I was on the witness-stand before.

Mr. GRIFFIN.—Q. Was that bill receipted?

A. I cannot say as to that.

Mr. GRIFFIN.—That is all.

Cross-examination.

Mr. LOFTUS.—Q. In regard to exhibits 4 and 5, where did you get your information as to who erected those signs?

A. From our man. He saw them putting them up. They were doing some work nearby, and our men drove by and they saw these people putting the sign up.

(Deposition of Joseph Hotchner.)

Mr. LOFTUS.—We move that the testimony in regard to the origin of the sign shown in exhibits 4 and 5 be stricken out as hearsay.

The COURT.—I will sustain the motion except as to what he saw there.

Mr. TOWNSEND.—This information that comes to him is hearsay.

Mr. GRIFFIN.—We have other information on the subject.

Q. Did you obtain any information from the records of the City and County of San Francisco as to who erected these signs?

A. I went to the Board of Works—

Mr. TOWNSEND.—We object to that.

The COURT.—One moment. If there is any evidence there, introduce it. You cannot give hearsay evidence by this witness. The objection is sustained. I understood there was an admission given upon the part of the defendants that they did construct a particular kind of a device, and the only question is whether that is an infringement. [45]

Mr. TOWNSEND.—We ought to have something before us to see what the structure is.

The COURT.—Are you through with this witness?

Mr. GRIFFIN.—I am through with the witness.

Mr. GRIFFIN.—That is our case.

Mr. TOWNSEND.—I think, in view of the character of the evidence introduced in the *prima facie*

(Deposition of Joseph Hotchner.)

case, that we are in a position to make a somewhat unusual motion at this time, in a case of this kind, and that is that the bill be dismissed.

The COURT.—It is a very unusual motion in an equity case. If you want to submit the case on the record, well and good; if not, go ahead.

Mr. TOWNSEND.—It would be equivalent to a nonsuit.

The COURT.—The Court cannot grant a nonsuit in a case of this kind.

Mr. TOWNSEND.—I believe that is so, your Honor.

Mr. GRIFFIN.—I would like to recall Mr. Hotchner for the purpose of identifying the building permit under which the electric sign was erected. The application was made by the American Electric Sign Company, the defendant herein.

Mr. TOWNSEND.—Infringement is based on making, selling, using. Those are the three elements, your Honor, that we are all so familiar with. We submit—

The COURT.—Just a moment. The corporation to which you referred is not a party defendant?

Mr. GRIFFIN.—Morgan & Long were doing business as the American Electric Sign Company.

Mr. TOWNSEND.—There is nothing in the complaint to that effect, so far as I recall. [46]

Mr. GRIFFIN.—Yes, the original bill of complaint alleges that.

(Deposition of Joseph Hotchner.)

The COURT.—I understand that the same issue is involved as to the other defendant, in any event?

Mr. TOWNSEND.—Yes, practically; the structure might be slightly different from the defendant's.

The COURT.—The application can be admitted. The application speaks for itself. I don't suppose this witness knows anything about it, does he?

Mr. GRIFFIN.—Yes.

The COURT.—Very well, proceed with your examination.

**Deposition of Joseph Hotchner, for Plaintiff
(Recalled).**

JOSEPH HOTCHNER, recalled for plaintiff.

Mr. GRIFFIN.—Q. Did you examine the records of the City and County of San Francisco with respect to the erection of signs, and particularly with respect to the erection of the sign reading, "Lunch," shown in Plaintiff's Exhibit 3?

A. I did.

Q. Who did you find made the application?

A. The application speaks for itself.

Q. Did you see the original application?

A. I did.

Mr. LOFTUS.—We object to this, your Honor.

The COURT.—That is hearsay. Have you the permit?

Mr. GRIFFIN.—This is a copy of the permit; it is not a certified copy.

Mr. TOWNSEND.—It is not even evidence. We object to it.

The COURT.—Objection sustained.

Mr. GRIFFIN.—At the next hearing I will ask to supply a certified copy of the permit under which the “Lunch” sign was erected. [47]

The COURT.—You can supply it at any time during the trial. Proceed with the defense.

Mr. TOWNSEND.—For your convenience, your Honor, we have segregated the claims of the patent, which claims are alleged to be infringed, into their elements, so that you may more readily appreciate the structure described.

With reference to the numerals of elements 1, 2, 3 and 4, they represent the elements of each claim. The characters A and B are the letters indicating the functions pertaining to each element.

The COURT.—In the first case, I understand that the raised molding is the only claimed infringement.

Mr. LOFTUS.—That is our understanding of it.

Mr. TOWNSEND.—The patent, itself, defines a very peculiar mode of construction of this molding. By reference to the patent drawing, of which we have enlargements here, it seems that the metal front or metal box had been bent, so as to provide a broader portion, which is marked “12.” First it is bent outward horizontally, and then inwardly.

This forms a pocket in which the glass, which is marked "13," rests. By the peculiar cutting and bending in the plaintiff's patent of the bevels or moldings, he forms a pocket which supports the glass in there, and so the glass lies in the plane of the metal front, and this metal molding comes down over the glass. He has a slight modification in Figures 4 and 3, where he puts a double kink into the metal, and yet receives the glass, so that at all times the glass lies in the plane of the metal front. I make this explanation because there has been an utter failure to explain the patented structure in the *prima facie* case of plaintiff. The claims are limited to the structures shown there. This glass at all times lies in the plane of the metal [48] front. Looking at a sign in front gives no internal indication of its organization. Mr. Loftus already has referred to the second patent and explained it to your Honor.

Mr. LOFTUS.—We would like to offer in evidence the certified copy of the file-wrapper and contents of patent No. 1,259,237, Joseph Hotchner, granted March 12, 1918, being the first patent in suit. We ask that it be marked Defendant's Exhibit "A."

We also offer in evidence certified copy of the file-wrapper and contents of patent No. 1,315,187, to Joseph Hotchner, granted September 2, 1919, being the second patent in suit, and ask that it be marked exhibit "B."

In connection with each of these file-wrappers, we

would like to offer the patents that were referred to by the examiner during the prosecution of the application, so that the Court may be fully advised as to the record in the Patent Office. Those patents are as follows:

Murray patent, 935,803, October 5, 1919. We ask that that be marked Defendant's Exhibit "C."

Bock patent, 1,085,530, dated January 27, 1914. We ask that that be marked Defendant's Exhibit "D."

Muller-Thyn Patent, No. 716,078, December 16, 1902. We ask that that be marked Defendant's Exhibit "E."

British Patent to Amy, 10,990, May 25, 1901. We ask that that be marked Defendant's Exhibit "F."

French Patent to Very, 334,837, August 25, 1903. We ask that that be marked Defendant's Exhibit "G."

Photostat of drawing of French patent to Genies. No. 408,992. We ask that that be marked Defendant's Exhibit "H."

Those are the references cited by the Patent Examiner in connection with the first patent to Hotchner. There is one other, which is a certified copy of a French patent to Boldes, with a translation [49] attached, the translation being made by the Patent Office, No. 335,943, dated September 17, 1903. We ask that that be marked Defendant's Exhibit "I."

Now, in connection with the second patent in suit, we offer the following in evidence.

United States patent No. 1,128,741, to Wortley, February 16, 1915. We ask that that be marked Defendant's Exhibit "J." The Wortley patent is one of the citations referred to in the file-wrapper.

Mr. TOWNSEND.—It is filed May 12, 1913. The stipulation on file states that not only plain copies may be introduced, but the dates of filing are accepted as true dates, unless otherwise shown.

Mr. GRIFFIN.—Very well. However, I would like to object to this particular patent, on the ground that it is a patent subsequent to the filing date. I don't remember the circumstances just now concerning the citation of this patent, but this patent was put into the record subsequent to the filing of the patent application.

Mr. TOWNSEND.—But was never overcome by any antedating affidavit, and, therefore, the plaintiff is estopped at this time from stating that it is not pertinent.

The COURT.—If it is one of the references, I will admit it.

Mr. LOFTUS.—The next is Thorne, No. 854,779, May 28, 1907. We ask to have that marked Defendant's Exhibit "K."

The next is Clark, No. 923,769, June 1, 1909. We ask to have that marked Defendant's Exhibit "L."

The next is Wortley No. 983,593, February 7, 1911. We ask to have that marked Defendant's Exhibit "M."

The next is Harris, No. 1,238,763, September 4, 1917. We ask to have that marked Defendant's Exhibit "N." [50]

The next is Wiley & Hough, No. 1,081,800, December 16, 1913. We ask to have that marked Defendant's Exhibit "O." The patents which have just been offered represent the citations that were referred to by the Patent Office in connection with the two Hotchner patents in suit.

We wish now to offer some additional patents which were not referred to by the Patent Examiner:

U. S. Patent to Little, No. 32,195, dated August 30, 1861. We ask to have that marked Defendant's Exhibit "P."

Hotchner No. 769,139, August 30, 1904. We ask to have that marked Defendant's Exhibit "Q."

The last two patents offered are particularly directed to the ornamental molding features.

Clark, No. 775,295, November 22, 1904. We ask to have that marked Defendant's Exhibit "R."

Mr. GRIFFIN.—Is the Clark patent pleaded in the answer?

Mr. LOFTUS.—I presume it is. If not, it can go in to show the state of the prior art.

The COURT.—Yes, the Clark patent is referred to.

Mr. LOFTUS.—The next is Fortman, No. 1,070,028, August 12, 1913. We ask to have that marked Defendant's Exhibit "S."

Mr. GRIFFIN.—Is that in the answer?

The COURT.—Apparently not.

The TOWNSEND.—It is offered to show the prior art, your Honor.

Mr. LOFTUS.—The two patents last offered have to deal with the downward illumination feature, bearing on the second Hotchner patent in suit.

Mr. GRIFFIN.—I object to these two patents upon the ground that no notice has ever been given of them.

Mr. TOWNSEND.—They are competent to show the prior art. [51]

The COURT.—That is my understanding of the matter.

Mr. LOFTUS.—We have some depositions here, your Honor, which have been taken under the equity rules, pursuant to notice.

The COURT.—I presume it is not necessary to take up the time of the Court reading these. They could be considered read. I will read them myself.

Mr. LOFTUS.—The first consists of two depositions taken in Los Angeles, the deposition of Paul D. Howse and J. E. Tucker.

The COURT.—Is the purpose of these depositions to show prior use?

Mr. LOFTUS.—Yes, your Honor, and in connection with a sign known as the White Sewing Machine Agency sign. In connection with the Los Angeles depositions, we offer these photographs of a sign erected in Los Angeles, which you will notice has the decorative outline molding constructed, however, of wood, but giving the same general ap-

pearance as any of these signs that are in dispute here.

The COURT.—When was this constructed, and how long has it been in use?

Mr. LOFTUS.—I think I can give that to your Honor.

Mr. GRIFFIN.—He says it was just previous to May 1st, 1914. That is corroborated by another witness.

Mr. LOFTUS.—Now we offer the depositions of John Anderson, C. E. Heft, and J. C. Zanker, taken at Portland, Oregon, on Friday, February 4, 1921, and the exhibits which accompany them. The same may be considered as having been read in evidence. Counsel for plaintiff was present at the taking of those depositions. Here is a photograph showing, in a general way, the construction of the Oregon Hotel sign, which was proven by this witness as having been erected as early as October 10, 1911. That is considerably [52] before any application date of Hotchner.

The COURT.—I would be a good witness to that myself, I have seen it many times.

Mr. LOFTUS.—The depositions may be considered as having been read and the exhibits as having been offered.

We next offer in evidence depositions of Archibald MacKenzie and C. E. Sprague, taken in San Francisco, on the 9th day of February, 1921. In connection with those depositions, the exhibits were kept in custody of counsel pursuant to stipulation,

and I will offer the exhibits at this time. The exhibits were marked "M-A," "M-2," "M-3," "M-4," "M-5," "M-6," "M-7," "M-8," "M-9," "M-10," "M-11," "M-12," "M-13," "M-14," "M-15," "M-16," "M-17," "M-18." The San Francisco depositions which have just been offered, had to do with what is known as the prismatic sign; this model was introduced at that time. This model is not claimed to be an early one, but was merely offered to illustrate the construction of the prismatic sign. Subsequently we adjourned to Denver, Colorado, where we took additional testimony, and cut one of the letters out of a sign that had been in use there in Denver since 1912. This is the letter which we cut from the sign in Denver. It is part of the original sign. It was installed in 1912, and was still in use in Denver as recently as six or nine months ago.

Now we offer the Denver depositions, additional depositions; Archibald Mackenzie, Thomas N. Norton, Clark Rider, Otis V. Spencer, together with the exhibits identified therein; those exhibits have been kept in the custody of counsel, pursuant to stipulation. They are offered herewith. They are Exhibits "A-1," "A-2," "A-3," "A-4," "A-5," "A-6," which is the specimen of a sign, and "A-7," "A-8," and "A-9."

I will state briefly the substance of the Denver depositions bearing on this prismatic sign, so-called, which may be referred [53] to later on in the testimony we have to offer here. At this

Denver session we called a witness by the name of Spencer, who is the permit and certificate clerk in the Department of Improvements of Parks in the city of Denver, and has been employed there for twelve years. He produced his official records, showing applications for permits to erect electric signs, and he also produced certificates of electrical inspection pertaining thereto. The following permits were read into the record: Permit No. 2894, dated August 17, 1912. Your Honor will see that that is more than two years prior to the filing date of the Hotchner patent. This permit refers to a sign erected by the Prismatic Sign Company, and while that sign is no longer in existence, the witnesses have all testified that it is identical with the sign we have here as Exhibit "A-6." The permit covering the sign, Exhibit "A-6," the application for the permit is dated July 31, 1912. The sign was to be erected by the Prismatic Sign Company for the Denver Electrical Company, the reading matter on the sign was, "Denver Electrical Company," and this letter is the last letter in the sign, being, "O" in the abbreviation "CO." That permit was issued after an inspection of the sign, after an inspection of the electric wiring. The final date of approval and inspection is August 14, 1912, which was two years and a week or so before Hotchner applied for his patent. This is the sign which the Prismatic Sign Company erected under the authority of that permit. The manufacturers of this sign are Archibald Mackenzie and a man by

(Deposition of Otis B. Spencer.)

the name of Norton, both of them testified in this case and identified the sign. The user of the sign is Clark Rider, whose deposition has been offered. He testified that the sign is still in the same condition as when originally erected. Counsel for the plaintiff stood on the sidewalk and watched while this letter was cut from the sign.

The COURT.—We will take a recess now until two o'clock.

(A recess was here taken until two o'clock P. M.)
[54]

Deposition of Otis B. Spencer, for Defendant.

Thereupon defendant called as a witness OTIS B. SPENCER, who testified as follows:

My name is Otis B. Spencer; living at the Y. M. C. A., City and County of Denver, Colorado; occupation, permit and certificate clerk in the Department of Improvements and Parks, City and County of Denver. Have been in that position five or six years. The department was formerly known as the Board of Public Works. I was with the Board of Public Works for six or seven years previously. The Board of Public Works issues permits for the hanging of electric signs in the city of Denver. I had supervision of these permits and keep the records. I have some of them with me relating to 1912, for electric sign permits. I have a record showing Permit No. 2935, that I issued in the name of my Department on August 19, 1912,—a permit to the Prismatic Sign Company to erect an

(Deposition of Otis B. Spencer.)

electric sign over the premises occupied by the New York Floral Company, at No. 526 Sixteenth Street, in accordance with the rules and regulations of the board or department.

Q. Prior to the issuance of that permit, on August 19, 1912, what procedure was gone through by the applicant and others so far as you know? In other words, what is the procedure leading up to the granting of one of these permits? A. The applicant submits his application, and states the size and character of the sign, and usually submits a sketch also. It is necessary, before the final issuance of permit, to produce from the Electrical Inspection Department of the city a certificate stating by the city electrician that the wiring has been inspected by his department and is satisfactory.

Q. Does such an inspection slip appear in connection with the permit you have just referred to?

A. Yes.

Q. What is shown by this inspection slip? [55]

Mr. O'BRIEN.—The question is objected to as the slip itself is the best evidence and really should be put in, either a photostat copy or the original, whichever counsel chooses. I do not object to a photostat copy in place of the original if it is impractical for the witness to produce the original, or part with it I should say.

A. The inspection slip shows that the city electrician did inspect the wiring in connection with this sign on August 17, 1912, and O. K.'d the same.

Q. Have you prepared at my request a true copy

(Deposition of Otis B. Spencer.)

of the application for permit which you have just referred to, and likewise a true copy of the inspection slip which you have just referred to?

A. Yes.

Q. Will you please produce that? A. I have it.

Q. Have you prepared this copy with the original to ascertain whether or not it is a true copy?

A. Yes.

Q. And do you state under oath that it is a true copy? A. I do.

Mr. LOFTUS.—The copy of application for permit and attached inspection certificate which is produced by the witness are offered in evidence as Defendants' Exhibit "A-1."

Mr. O'BRIEN.—Objected to as not the best evidence and as impertinent, irrelevant and immaterial.

Said Defendants' Exhibit "A-1" is in words and figures as follows, to wit:

Defendants' Exhibit "A-1."

ELECTRICAL INSPECTION DEPARTMENT
City and County of Denver.

Permit No. 2894.

To the Honorable Board of Public Works:

The electric wiring on the sign to be installed at
526-16th Street, owned by NEW YORK FLORAL

CO., has been inspected and approved by this department. [56]

Inspected, Date, 8-17-12.

Inspector—Oliver.

(Signed) JNO. MALM,
City Electrician.

S.

APPLICATION FOR PERMIT TO ERECT SIGN.

~~July 29, 1912.~~

No. 2935.

Denver, Colorado.

To the Board of Public Works, City and County
of Denver:

Please issue to Prismatic Sign Co. subject to the authority conferred by the Rules and Regulations of the Board of Public Works a permit to erect electric sign 12 ft. long by 3 ft. wide, and 7 inches deep from the premises occupied by New York Floral Co.

Said sign to be erected in front of premises located at 526-16th Street and not to project more than 2 feet from lot line at outermost point of sign, as more fully appears by sketch on back of this paper.

Sign to be put up on top of cornice and project 2 feet from lot line.

The privilege is asked for within 7 days from date and we estimate it will probably be ——— months before any other sign in the same place will be required for the purpose of inspection. The work to be done subject to your rules and direction, and the general laws and ordinances of the

(Deposition of Otis B. Spencer.)

city, and at our risk for any and all loss or damage occasioned to the City, either directly or indirectly, and the amount of any judgment thereby obtained against said city shall be conclusive evidence of our liability.

PRISMATIC SIGN CO.

By A. MACKENZIE.

O. K.—SETH BRADLEY,

President.

(Endorsed on side:)

Received of the Prismatic Sign Co. 50¢ to cover cost of permit. Aug. 19, 1912. [57]

ALLISON STOCKER,

Treasurer.

By B., Deputy.

Q. Referring again to your books of records, will you please state whether or not you have any records showing an application by the Prismatic Sign Company to erect a sign on the premises occupied by a Mrs. DuBois in Denver, Colorado.

Mr. O'BRIEN.—Objected to as leading.

A. Yes.

Q. What is the number of that application?

A. 2951.

Q. When was that permit finally granted?

A. September 3, 1912.

Q. And is there any certificate of inspection from the Electrical Department in connection with this permit or application for permit? A. Yes.

Q. What is the date shown by the inspection certificate?

(Deposition of Otis B. Spencer.)

A. It shows that the city electrician on September 3, 1912, inspected and certified the wiring in connection with the sign as O. K.

Q. Have you prepared at my request a true and complete copy of the application for permit, No. 2951, which you have just referred to, and likewise of the certificate of inspection from the Electrical Department? A. Yes.

Q. Please produce that. A. I have it.

Mr. LOFTUS.—Copy of application for permit No. 2951, with attached certificate of electrical inspection, produced by the witness, are offered in evidence as Defendants' Exhibit "A-2."

Mr. O'BRIEN.—Objected to as not the best evidence, and also incompetent, irrelevant and immaterial.

Said Defendants' Exhibit "A-2" is in words and figures as follows, to wit: [58]

Defendants' Exhibit "A-2."

ELECTRICAL INSPECTION DEPARTMENT
City and County of Denver.

Permit No. 3259.

To the Honorable Board of Public Works:

The electric wiring on the sign to be installed at 757 Broadway, owned by MRS. DU. BOIS, has been inspected and approved by this department.

Inspected, Date—9-3-12.

Inspector—Oliver.

(Signed) JNO. MALM,
City Electrician.
S.

APPLICATION FOR A PERMIT TO ERECT
SIGN.

~~Aug. 27, 1912.~~

No. 2951.

To the Board of Public Works, City and County
of Denver:

Please issue to Prismatic Sign Co. subject to the authority conferred by the Rules and Regulations of the Board of Public Works a permit to erect electric sign 17 ft. long by 3½ ft. wide, and 7 in. deep from the premises occupied by Mrs. DuBois.

Said sign to be erected in front of the premises located at 757 Broadway street, and not to project more than 5 ft. from lot line at outermost point of sign, as more fully appears by sketch on back of this paper.

No. of lights—15.

The privilege is asked for 7 days from date, and we estimate it will probably be several months before any other sign in the same place will be required for the purpose of inspection. [59] This to be done subject to your rules and directions, and the general laws and ordinances of the city, and at our risk for any and all loss or damage occasioned to the city, whether directly or indirectly, and the amount of any judgment thereby obtained

(Deposition of Otis B. Spencer.)

against said city shall be conclusive evidence of our liability.

PRISMATIC SIGN CO.

By A. MACKENZIE.

O. K.—SETH BRADLEY,

President Board of Public Works.

(Endorsed on side:)

Received of Prismatic Sign Co. 50¢ to cover cost of permit. Sept. 3, 1912.

ALLISON STOCKER,

Treasurer.

By P., Deputy.

Q. Will you please refer to your book of permits, and state whether or not you have any record of application for a permit and issuance thereof to the Prismatic Sign Company of Denver, Colorado, for the erection of a sign on the premises occupied by Denver Electrical Company, 137 Fifteenth Street, Denver, Colorado. A. Yes.

Q. What is the number of that application?

A. No. 2984.

Q. When was that application finally issued?

A. October 15, 1912.

Q. Is there attached to this an inspection certificate from the Electrical Inspection Department?

A. Yes.

Q. What date is shown thereby?

A. The date shown on the electrical certificate is October 14, 1912.

Q. Have you at my request prepared a true and full copy of this application for permit No. 2984,

(Deposition of Otis B. Spencer.)

and of the certificate of inspection by the Electrical Inspection Department attached thereto?

A. Yes.

Q. Please produce that?

A. I have it here. [60]

Mr. LOFTUS.—Copy of application for permit No. 2984 and attached certificate of inspection from the Electrical Inspection Department, produced by the witness, are offered in evidence as Defendants' Exhibit "A-3."

Mr. O'BRIEN.—Objected to as not the best evidence and incompetent, irrevelant and immaterial.

Said Defendants' Exhibit "A-3" is in words and figures as follows, to wit:

Defendants' Exhibit "A-3."

ELECTRICAL INSPECTION DEPARTMENT
City and County of Denver.

Permit No. 3794.

To the Honorable Board of Public Works:

The electric wiring on the sign to be installed at 137-15th St., owned by DENVER ELECTRICAL CO., has been inspected and approved by this department.

Inspected, Date—10-14-12.

Inspector—Thorn.

(Signed) JNO. MALM,
City Electrician.
S.

APPLICATION FOR A PERMIT TO ERECT
SIGN.

Denver, Colo., July 31st, 1912.

No. 2984.

To the Board of Public Works, City and County
of Denver.

Please issue to Prismatic Sign Co. subject to the authority conferred by Rules and Regulations of the Board of Public Works a permit to erect electric sign 24 ft. long by 32 inches wide, [61] and 6 inches deep, from the premises occupied by Denver Electrical Co. Said sign to be erected in front of premises located at 137-15th Street and not to project more than 18 inches from the lot line at outermost point of sign, as more fully appears by sketch on back of this paper.

The privilege is asked for 7 days from date, and we estimate it will probably be several months before any other sign in the same place will be required for the purpose of inspection. The work to be done subject to your rules and directions, and the general laws and ordinances of the city, and at our risk for any and all loss or damage occasioned to the city, either directly or indirectly and the amount of any judgment thereby obtained against said city shall be conclusive evidence of our liability.

PRISMATIC SIGN CO.

G. A. MACKENZIE.

O. K.—SETH B. BRADLEY,
President.

(Deposition of Otis B. Spencer.)

(Endorsed on side:)

Received of Prismatic Sign Co. 50¢ to cover cost of permit.

Oct. 15, 1912.

ALLISON STOCKER,

Treasurer.

Q. What can you say, Mr. Spencer, in regard to the date when these permits were applied for as shown by your records?

A. In this last instance the application itself is dated July 31, 1912, but I judge we held it up for investigation, for it was paid for on October 15, 1912, as shown by the treasurer's receipt upon the margin of the application. This often happens with this class of permits.

Q. What is shown on the reverse side of these applications for permits?

A. Well, very often there is a rough lead pencil [62] sketch showing the lettering and often the size of the sign.

Mr. O'BRIEN.—Part of the answer is objected to as not responsive to the question.

Q. Have you reproduced these rough sketches in connection with the applications for permits which have been produced here?

A. Wherever they have occurred, yes.

Q. Bearing in mind the regulations of your department and the customs of those who apply for permits, can you state approximately when the various signs referred to in these three permits,

(Deposition of Otis B. Spencer.)

exhibits "A-1-2-3," were completed and placed in operation?

A. I know of no reason why they should not be hung in place and in operation within the time limit given on the permit which is usually six days after its issuance.

Mr. O'BRIEN.—The answer is objected to as not responsive to the question.

Q. I note in all of these applications for permits which have been offered here the following at the bottom thereof: "O. K.—Seth B. Bradley, President." Who is Mr. Bradley and what is the purpose of this O. K.?

A. We have been very careful about the erections of signs in this city, and the regulations are stringent. Mr. Bradley was the president of the board, and usually these applications were referred to him for his approval before being issued.

Q. How soon after an applicant presented his application is the matter referred to Mr. Bradley customarily? A. At once.

Q. The same day? A. Yes, the same day.

Q. Before Mr. Bradley places his O. K. on the application what investigation is made by him or those working under him?

Mr. O'BRIEN.—Objected to as leading.

A. Mr. Bradley or one occupying his place sometimes makes personal investigation, but not often. He usually sends an inspector from our office to inspect the sign and place a report back to him.

(Deposition of Otis B. Spencer.)

Q. Has this Department of Improvements and Parks a seal?

A. I presume it has a seal, and that the secretary thereof is the custodian.

Q. Do you use a seal for yourself in the issuing or granting of these permits? A. Never; no.

Q. Have you carefully compared all of these copies which you have presented here with your original record? A. Yes.

Q. And are they true, correct and full copies?

A. Yes, so far as I know. I use great care.

Cross-examination.

(By Mr. O'BRIEN.)

Q. Mr. Spencer, who made the pencil notations on the back of application No. 2951, Defendants' Exhibit "A-2," if you know? A. I did.

Q. Was that copied from the original that was on the application blank?

A. Yes, it is right here. A. Yes, it was, Mr. O'Brien. There it is.

Q. And that was supposed to show the construction of the sign to be erected?

A. Oh, just to give you a rough idea of about what they propose to put up.

Q. There is nothing in the application itself to indicate what the construction of the sign was to be, otherwise than the size of it, and that it was to be erected in a certain way with reference to the street. What I mean is, the special construction of the sign, independently of its size, etc., was not indicated in the applications, any of them?

(Deposition of Otis B. Spencer.)

A. Well, I don't think that is hardly so, because they state they will erect an electric sign subject to our rules and regulations, giving the size, the place and for whom it is to be constructed, how far it will project into the street and, in this instance, the number of lights and the time they wanted to put it up in, etc. [64]

Q. You don't keep duplicates of the permits themselves issued on these applications?

A. I keep a stub of them, yes, a stub memoranda.

Q. About how long has the city been issuing permits such as these applications call for, if you know?

A. Well, over twenty years, and possibly longer I should judge.

Q. And you have been connected with the department that issues such permits how long?

A. In this capacity about twelve years I should guess.

Q. Why were the dates on Nos. 2951 and 2935 marked out on the copies which have been introduced in evidence of the applications to which you have testified?

A. I assume because the applicant brought them in or intended to bring them on that date, but the permits finally being issued at a later date, the first dates on the applications were thereupon erased, or a line struck through them.

Q. Then there is nothing except these dates that were stricken out on those applications numbered

(Deposition of Otis B. Spencer.)

2935 and 2951 to show when the applications were made?

A. Yes, the treasurer's receipt shows the absolute date on which they were issued.

Q. But I mean on the applications themselves?

A. Yes, the treasurer's receipts.

Q. But this shows when they were paid for, not when they were applied for, the receipts?

A. Yes, they were applied for previous to that.

Q. But there is nothing on the applications themselves, that is, the two in question, which shows when they were applied for?

A. Except the dates obliterated.

Q. And they were obliterated because they were incorrect; is that right?

A. They were obliterated because the permits were not issued on those specific dates. [65]

Q. But why should they be obliterated on that account? The applications would not necessarily have to conform in date with the dates of the permits, would they?

A. Yes, we always make them correspond with the date of the issuance of the permit.

Q. But when these dates were stricken out, then there were no dates at all, so there could not have been a correspondence of dates in that regard, could there?

A. Then the treasurer's receipt signifies the date.

Q. But that is not the date that the applications were made?

(Deposition of Otis B. Spencer.)

A. No, that isn't the date the applications were made.

Redirect Examination.

(By Mr. LOFTUS.)

Q. State whether or not the date appearing in the left-hand margin of each of these applications for permits, exhibits "A-1-2-3," represent the actual date when the permit was granted? A. Yes.

Mr. LOFTUS.—Before the present witness is dismissed counsel for the plaintiff is requested to state whether or not he has any objections to the copies which have been offered, of the original records, and if for any reason he objects thereto, then defendants will endeavor to procure photostat copies of these original records in order that there may be no question raised later as to the accuracy of these copies, it being apparent that the original records of the municipality cannot be offered in a case of this kind.

Mr. O'BRIEN.—I would prefer photostat copies as they are bound to be absolutely correct in every respect, and not only that—it is easy to get a considerable number of copies probably with less expense than to do it by typewriting. I should much prefer to have photostat copies, and if photostat copies are produced I would not object so far as the production of copies instead of the original is concerned. Otherwise I would simply let my objections stand as they are. [66]

Mr. LOFTUS.—Counsel for plaintiff is advised

(Deposition of Archibald Mackenzie.)

that the photostat copies will be produced as soon as they can be prepared.

Deposition of Archibald Mackenzie, for Defendant.

Thereupon defendant called ARCHIBALD MACKENZIE, who testified as follows:

I have previously testified in this case. I can identify the application No. 2935 from the book of records of the Department of Improvements and Parks of Denver, made by the Prismatic Sign Co., for permission to erect a sign on the premises occupied by the New York Floral Company, 526 Sixteenth Street. The application is in my handwriting. It was made July 29, 1912. I am familiar with the procedure necessary to obtain the permit to erect a sign in the City of Denver. The application is first submitted to the Art Commission, to obtain the O. K. from the Commission. Mr. Seth Bradley was President of the Board of Public Works. After Mr. Bradley put his O. K. on we would go to the Board of Public Works for a permit. I am familiar with Mr. Otis B. Spencer's initials. I believe this permit was finally issued August 19, 1912. The sign erected for the New York Floral Co., 526 Sixteenth Street, Denver, was finally erected—placed in operation—within seven days from the time this permit was taken out—somewhere in the neighborhood of the 19th to the 22d of August, 1912. When we had a sign finished and ready to hang we would have to go to the City Electrician and have him inspect the wiring before

(Deposition of Archibald Mackenzie.)

we could get a hanging permit to put it up. I can also identify Permit No. 2951, in the name of the Prismatic Sign Co., for the erection of a sign on the premises occupied by Mrs. Dubois, 757 Broadway.

Q. In whose handwriting is this? A. Mine.

Q. When was this application made?

A. August 27, 1912. [67]

Q. That date appears to be scratched over with a lead pencil. Do you know when that occurred—the date of August 27, 1912?

A. No, sir, I don't know why that was done. It says this privilege is asked for in seven days, but you see that was hung evidently within the seven days' time.

Q. Turning now to application for permit No. 2984 in the name of the Prismatic Sign Company for permission to erect an electric sign on the premises occupied by the Denver Electrical Company, 137 Fifteenth Street, can you identify this application? A. I can.

Q. In whose handwriting is it? A. Mine.

Q. When was that application made?

A. July 31, 1912.

Q. Was this sign erected? A. It was.

Q. When was it erected?

A. It was hung right about the time of October 15, 1912.

Q. Where is that sign to-day?

A. 137 Fifteenth Street.

Q. Is it in the same condition to-day as it was when you erected it? A. Yes.

(Deposition of Archibald Mackenzie.)

Q. When did you last see it?

A. About a half hour ago.

Q. Referring again to the sign erected for Mrs. DuBois at 757 Broadway, Denver, when was that sign completed and installed? A. September 3, 1912.

Q. Where is that sign to-day?

A. I couldn't say.

Q. When did you last see it?

A. Oh, I imagine six or seven years ago.

Q. How did that sign compare in construction with the one you erected for the Denver Electrical Company? A. Same construction.

Q. Similarly with regard to the sign referred to in application for permit No. 2935 on the premises of New York Floral Company, 526 Sixteenth Street, Denver, Colorado, was that sign erected and installed? A. It was.

Q. Where is that sign to-day?

A. I couldn't tell you.

Q. When did you last see it?

A. That sign was in place there [68] I would imagine for a little over a year. I haven't seen it for probably six or seven years.

Q. How did that sign compare in construction with the sign you erected for the Denver Electrical Company here? A. Same construction.

Cross-examination.

(By Mr. O'BRIEN.)

Q. When you refer to the sign erected for the

(Deposition of Archibald Mackenzie.)

Denver Electrical Company, which one do you refer to, if there was more than one?

A. We erected two for the Denver Electrical Company; the last one of the two.

Q. The dates which you have given with reference to the various applications for permit which have been introduced here in evidence I noticed you read from the applications themselves in the book which Mr. Spencer has produced. Is that the only way you have of fixing those dates, Mr. Mackenzie? A. Definitely, yes, sir.

Mr. LOFTUS.—Counsel for plaintiff is hereby invited to accompany attorney for defendants to 137 Fifteenth Street, in this city, a matter of five or six blocks, and there inspect the electric sign referred to in application for permit, exhibit “A-3,” said sign being now in use on the premises of the Denver Electrical Company in the same position as when originally hung. It is the intention of defendants, if possible, to remove this sign and procure a suitable part thereof to be offered in evidence, and this opportunity is given counsel for plaintiff to inspect the sign so that he may know that the portion to be offered in evidence has not been altered in any way. Likewise witness Mackenzie will be asked to inspect the said sign in its present condition, and testify as to any changes that may have been made since the time of its original installation. [69]

Mr. O'BRIEN.—Counsel for plaintiff will be glad to inspect the so-called sign referred to, but, by accepting the invitation to do so, does not waive

(Deposition of Thomas M. Norton.)

any objections which he may see fit to offer to any testimony that is offered concerning the sign, and particularly with reference to the part which apparently counsel for defendants proposes to introduce in evidence. In other words, the acceptance of the invitation does not waive any objections on behalf of plaintiff which his counsel may see fit to offer.

Deposition of Thomas M. Norton, for Defendant.

The defendant thereupon called THOMAS M. NORTON as a witness, who testified as follows:

My name is Thomas M. Norton; 2921 West Twenty-fifth Avenue, Denver; painting and papering contractor. I was in the electric sign business in the latter part of 1910, and up to about 1917, connected with the Prismatic Sign Company. I was one of the two partners. The other partner was Mr. A. Mackenzie. We made principally the Prismatic sign. It is a sign constructed of sheet metal with a prism plate located in the rear of the letter, the letter itself being outlined in some instances by a painted outline and in some instances by a raised metal molding. The sign was illuminated by electric lights inside the sign. Raised metal outline molding signs were made by the Prismatic Sign Company for the Denver Electrical Company's sign at 137 or 139 Fifteenth Street, Denver, a 5¢ sign (that is, reading on the sign 5¢) that was on West Colfax near Lipan. The florist sign made for the New York Floral Company, that

(Deposition of Thomas M. Norton.)

was on Sixteenth Street between Welton and Glenarm. A drug sign at Littleton, Colorado made for a druggist named Thompson. A sign reading DuBois on Broadway between Eighth and Ninth. The sign at Colfax and Lipan was made in 1911, I could not give the month, I believe, or 1912. It was made for Huffman the druggist. The other one at the Denver Electrical Company some time the first part of October; I won't say the very first, in the year 1912. The [70] DuBois and Floral signs, from memory, were made about July or August, 1912. All were alike with respect to the outline molding. Some are in use to-day.

Q. Which ones?

A. The Denver Electrical is still in use.

Q. When did you last see it?

A. I have seen it to-day.

Q. Did you examine it?

A. Yes, sir, we were over looking at the sign this afternoon.

Q. How does its present condition compare with its condition at the time you installed it?

A. Well, it was repainted last fall.

Q. Has its construction been altered in any way?

A. No, sir.

Q. Are you familiar with the procedure necessary to be gone through so far as the Department of Improvements and Parks is concerned, in order to get a permit to hang an electric sign in the City of Denver?

A. Yes, sir; I am.

Q. Just briefly tell us what that procedure is.

(Deposition of Thomas M. Norton.)

A. Before we start to make the sign we are expected to make out a rough sign, showing the sign, the construction and dimensions and some details of the sign, and apply for a permit to build the sign. Then we—after the sign is under way, then you have to have the sign inspected. You have to make out a wiring permit, and after the sign is completed, then you get your hanging permit to put the sign in place, and they issue you a permit. I have taken out a good many.

Q. Now, then, at the time the sign is inspected as to wiring, what is its condition? How far along is it?

A. Well, the sign is practically ready to hang.

Q. And after it is inspected and approved how soon thereafter is it hung?

A. Usually within two or three days.

Q. What was the practice of the Prismatic Sign Company in that regard?

A. We usually asked for the permit a day or two days before we put it up. Sometimes we hung it the same day we took [71] out the permit.

Q. Do you recall any instance where you waited six or seven days after the permit was granted in which to hang the sign? A. No, sir, I do not.

Q. Do you recall selling any signs to the May Company, a department store in this city?

A. Yes, sir.

Q. How many such signs did you sell to them?

A. We sold—will I give the different signs?

Q. Yes, if you can recall.

(Deposition of Thomas M. Norton.)

A. One sign reading "Excello Trousers"; I believe it also said "Finest on Earth." Another reading "Hannan Shoes," another "Silver Collars," and there were two reading "Society Brand Clothes."

Q. Which were the earliest of these signs?

A. The "Excello Trousers."

Q. Do you recall when that was installed?

A. That was installed—I think it was in the latter part of 1912.

Q. How did the construction of that sign compare with the one you erected for the Denver Electrical Company?

A. It is the same outlining moulding and the same construction all the way through.

Q. I show you a photograph which was offered in evidence at the taking of the Mackenzie deposition as exhibit "M-3," and ask if you are familiar with the sign shown therein?

A. Yes, sir; I remember it well.

Q. Is that the Excello sign you have just referred to? A. Yes, sir.

Q. I hand you a photograph which has been offered in evidence here at the taking of the Mackenzie deposition as "M-a-2," and ask if you recognize the sign shown therein. Yes, sir. I do recognize it.

Q. State what you know about that sign.

A. Well, it is the same metal outlining moulding.

[72]

Q. Where was that sign installed?

(Deposition of Thomas M. Norton.)

A. It was hung at Littleton, Colorado.

Q. Was that installed by your company?

A. Yes, sir.

Q. What is your recollection as to the time that that was installed?

A. That sign was hung some time in 1911.

Q. Where is that sign to-day?

A. I couldn't say. It has been taken down and I don't know where it is.

Q. Have you recently inquired about it?

A. Yes, sir.

Q. I will show you another photograph which is offered in evidence, Defendants' Exhibit "M-17," and ask you if you recognize the sign shown therein.

A. Yes, sir.

Q. Tell us what you know about that sign.

A. That is the same construction, the same prismatic glass and the raised metal outlining of letter.

Q. Where was that sign installed?

A. At Littleton, Colorado.

Q. What year?

A. It was hung just about the same time as the drug sign.

Q. Where is that sign to-day, if you know?

A. I couldn't say.

Q. Have you recently inquired about it?

A. Well, I was out to Littleton, but we didn't see the sign or anybody that knew anything about it.

Q. I show you a photograph containing a sign reading as follows: "Denver Electrical Co. Up-To-

(Deposition of Thomas M. Norton.)

Date Electric Fixtures," and ask you if you are familiar with the sign shown therein?

A. Yes, sir; I am.

Q. Tell us what you know about that.

A. Well, the words "Denver Electrical Co." were the same construction, with the prismatic glass and the letter outlined by this raised metal moulding. The lower line was a flat letter with a paint outline.

Q. Is that the sign you have testified was installed and hung in the early part of October, 1912?

A. Yes, sir.

Q. And is that the sign that you have testified is still in use? [73] A. Yes, sir.

Q. And that is the sign you saw to-day?

A. Yes, sir.

Mr. LOFTUS.—The photograph identified by the witness if offered in evidence as Defendants' Exhibit "A-4."

Mr. O'BRIEN.—Objected to as not having been sufficiently identified and as incompetent, irrelevant and immaterial.

Q. What has become of the New York floral sign, if you know?

A. Well, that sign was taken down from where it was hung and laid on the roof, and that is the last I know of the sign. We took it down.

Q. How long ago was that?

A. That was in the neighborhood of six years ago.

Q. And what has become of the DuBois sign?

(Deposition of Thomas M. Norton.)

A. I don't know. We was to see Mrs. DuBois this morning, and she is out of the city.

Q. And you mentioned a sign reading "5¢" in front of the theater at Colfax and Lipan. What has become of that sign?

A. That sign was in place until about a month ago, and they went to take it down themselves and dropped it down and broke it, and then they had it hauled away. I think we can probably get that sign back yet this afternoon.

Q. That is, what is left of it? A. Yes, sir.

Cross-examination.

(By Mr. O'BRIEN.)

Q. How long did it take to make a sign like that one, for instance, exhibit "A-4," Mr. Norton?

A. You mean the hours it would take one man to make it if he worked steadily?

Q. I don't care how you express it. How long did it take you folks to make it approximately?

A. Oh, in the neighborhood of two weeks.

Q. Was the sign made before you asked for the permit? A. You mean always? [74]

Q. Well, in this particular case.

A. Well, I don't remember this particular case. They have certain rules and oftentimes when we knew we were within their rules, we made the sign before we asked for the permit. If there was any doubt, we asked for the permit before we started the construction.

Q. How long has the city been asking permits for such signs as that?

(Deposition of Thomas M. Norton.)

A. I couldn't say. It was probably before we started in.

Q. Was the City of Denver granting permits for signs like that at the time you installed the sign at Littleton?

A. You mean the city of Denver?

Q. Yes. A. I believe they were.

Q. Well, do you say that that sign, exhibit "A-4," was made with raised metal moulding?

A. Yes, sir; the "Denver Electrical Co.," the top line, was all made with the raised metal moulding.

Q. What is there on that sign that indicates that raised metal moulding?

A. You mean that shows in the photograph?

Q. Yes, sir.

A. It shows the shading to the left; it shows the shading to the left in the latter part of the sign. You can see the shading on the left, when it is darker than the face and darker than the aluminum letter. This raised edge was painted usually a bright red. The face of the letter was aluminum. The raised edge was usually a bright red, and the face of the sign was either painted or smalted.

Q. What does the central dark line indicate in each one of the letters of the "Denver Electrical Co."?

A. That is the portion of the letter that the light from the prismatic glass shines through.

Q. What does the white part of the letter indicate in the photograph?

A. That is the bevelled edge that tapers from the

(Deposition of Thomas M. Norton.)

raised edge down to the base of the sign, and covered with [75] aluminum or gold leaf or paint, for the purpose of making a better sign in the daylight.

Q. So far as the photograph shows, there is nothing indicates a bevel, is there, Mr. Norton? Doesn't it look perfectly flat to you so far as anything shown on that photograph is concerned?

Mr. LOFTUS.—Objected to as incompetent, irrelevant and immaterial.

A. The moulding surfaces receiving the greater number of the sun's rays appear brighter than those receiving the lesser number, whereas in the flat letter in the line below, all portions of the letter appear to be equally brilliant.

Q. How was this sign made, that is, the part which you say constitutes the raised metal moulding?

A. Well, to start with, the letters are laid out, and the part to be illuminated is removed. Then the metal moulding is mitered and cut to fit the various letters and soldered in place, the bevelled portion being painted to give a better daylight effect, the raised edge of the molding usually being painted a bright red and the background being painted or covered with a smalt.

Q. You say the letter was first laid out. What do you mean by "laid out," Mr. Norton?

A. Well, the letter was outlined by lines on which to cut out the part to be illuminated.

Q. Does the dark line indicate in those words,

(Deposition of Thomas M. Norton.)

“Denver Electrical Co.,” the part that was cut out?

A. Yes, sir.

Q. And the white indicates the raised metal part?

A. Yes, sir; I call that the bevelled portion.

Q. What is shown white—the part shown white?

A. That is the bevelled portion that rises from the dark part to the edge; that is painted red—spoken of as painted red.

Q. Which way does the raised part bevel or incline with reference to the dark part? I speak with reference to this photograph now. [76]

A. Away from the face of the sign; outward from the face of the sign.

Q. And how do you say that raised part was formed for each letter?

A. It is bent to shape in a brake, what they term a brake; it is a bending machine. They are formed in lengths of several feet, and then they are cut and fitted to form joints at the miters and angles, and secured to the face sheet of the sign by soldering.

Q. What is the height of each of those letters in the words “Denver Electrical Co.” in the actual sign, approximately? A. About ten inches.

Q. You said in your last answer that the raised metal part was made in lengths of several feet.

A. Yes, sir; and that is cut in several pieces to fit around the different portions of the letter.

Q. Is the raised metal part for each letter a single piece, or is it in two distinct pieces?

A. It is in several pieces. In an “O” it is eight

(Deposition of Thomas M. Norton.)

separate pieces outside and eight separate pieces inside.

Q. Is the part that is outside of the dark line in the photograph, and also that is inside of the dark line—are they all one piece or two pieces, that is, after the letter is formed? What I mean is, does what appears to be the dark line in those letters “Denver Electrical Co.” separate two raised metal parts shown by the white of each letter? To my view there is a white line on each side of the dark line of each letter. A. Yes, sir.

Q. Now, you said the dark lines represents the part that the light shines through. A. Yes, sir.

Q. What I want to know is if the raised metal part on the outside of the dark line and also on the inside of the dark line all form one piece or two pieces in the letter?

A. In different letters it is different. [77]

Q. In a single letter—is it all one piece in a single letter, the raised metal part?

A. In the L after it is soldered it is one continuous piece clear around the L. The O it is two separate pieces, one outside continuous and one inside continuous.

Q. Then you would cut out the outline of the letter in the metal plate, and put raised metal parts on both sides of it and solder those parts to the plate; is that correct?

A. Yes, sir, that is correct.

Q. In Defendants, Exhibit “M-a-2” the appearance of the letters is entirely different from that in

(Deposition of Thomas M. Norton.)

Defendants' Exhibit "A-4," and yet, as I have understood your testimony, both signs were made in the same way. How do you account for the difference in appearance?

A. Well, in the Denver Electrical Co. the bevelled face of the letters is aluminum, the raised edge dark red, and the face of the sign a black smalt. In the drug sign at Littleton the bevelled portion of the letter is aluminum, the raised edge was the red, and in addition to the red shading on the raised edge there is a painted shade to make the letter appear to be raised above the surface.

Q. Well, then, is it true that the letter is not actually raised above the surface in Defendants' Exhibit "M-a-2"?

A. It is raised above the surface, but the painted shade is in addition to the raised metal moulding as in the Denver Electrical Company sign. It is the same construction only it has the painted shade in addition to the raised metal moulding.

Q. Then a photograph of such a sign is a very inaccurate illustration, is it not, so far as giving anyone a definite idea of the construction of the letters?

Mr. LOFTUS.—Objected to as incompetent, irrelevant and calling for a conclusion or opinion of the witness.

Q. I will elaborate that. To illustrate, I will say that the one sign, namely, Defendants' Exhibit "M-a-2," has an entirely different appearance from Defendants' Exhibit "A-4," and you say the

(Deposition of Thomas M. Norton.)

only thing that causes this difference in appearance is a [78] little paint, as I understand it. From that standpoint I want to know if you consider a photograph is a correct illustration of the construction of the sign?

Mr. LOFTUS.—Last objection repeated.

A. This photograph of the drug sign clearly shows the shade on the raised metal edge of the sign in addition to the painted shade on the face of the sign, and this sign had both.

Q. But without an explanation do you think anyone, in looking at the two signs, would think they were both made in the same way?

Mr. LOFTUS.—Same objection.

A. Yes, sir; I believe anyone who is familiar with this construction of sign by the shading on the bevelled portion of the letters, could tell whether it has raised surface or not irrespective of the paint.

Q. But could they understand the degree of raise?

Mr. LOFTUS.—That is objected to as it has no bearing whatever on the issues, what this witness thinks. Others may know. He can only answer for himself. He can state whether he regards the two as being alike. It is clearly incompetent for him to testify what someone else might conclude from looking at these photographs.

A. I doubt if they could understand the degree of raise. They could tell there is a difference in the angle that is exposed to the rays of the sun, so that they could tell there is a raise to the bevelled surface.

(Deposition of Thomas M. Norton.)

Q. How was the part of the sign "Up-To-Date Electric Fixtures" made?

A. Simply the central portion was cut out; no moulding was soldered on; simply the part showing white in the photograph was simply painted flat upon the flat surface of the sign plate.

Q. That is, the white part of the letters "Up-To-Date Electric Fixtures" in exhibit "A-4" was painted on instead of being formed [79] by raised metal?

A. It is put on with aluminum leaf on the surface of the sign face.

Q. The leaf simply being applied to the surface of the metal around the cut out part?

A. Yes, sir.

Q. You said that the Denver Electrical Company's sign, namely, exhibit "A-4," was installed, as I understood you, the first part of October, 1912. How do you fix that date?

A. Well, I was down to the city electrician's office, looking up records, and the Board of Public Works, looking up records—when the electrical permits were taken out and different hanging permits.

Q. But you have no other way of fixing the dates? A. No, sir.

Q. Why do you say the first part of October, 1912? If you have looked up these dates why can you not make it more definite?

A. Well, I have a good many dates I was trying

(Deposition of Thomas M. Norton.)

to remember, and I had it approximately in my mind.

Q. Did you say that the sign designated Defendants' Exhibit "M-3" was made in the same way as the words "Denver Electrical Co." in exhibit "A-4"?

A. Yes, sir; in precisely the same way.

Q. But to my view in the Defendants' Exhibit "M-3" the entire part of each letter shows completely white, while in the "Denver Electrical Co." there is a dark line between two white lines in each letter. How do you account for that difference?

A. Why, the reflection from the arc lights on the glass surface on the sign, as well as on the silver portion of the letters in exhibit "M-3," and also from the flashlight that was used when the photograph was taken, as well as the sign being illuminated at the time the picture was taken.

Q. Is there anything in that exhibit "M-3" to indicate that the light shines through any part of the letters as the dark line in "Denver Electrical Co." of exhibit "A-4"?

A. The central portion or the illuminated part of the letters is more brilliant than the moulding [80] surrounding this part (indicating) because of the illumination from the interior.

Q. Was the sign illuminated at the time that photograph was taken in exhibit "M-3"?

A. Yes, sir; it was.

Q. Is that also true of exhibit "A-4"?

A. No, sir.

(Deposition of Thomas M. Norton.)

Q. Then exhibit "A-4" was not illuminated at the time that photograph was made? A. No, sir.

Q. How about exhibit "M-a-2," was that illuminated at the time the photograph was made?

A. No, sir.

Q. How definite was the sketch furnished at the time you applied for a permit to put up a sign of this character?

A. Well, we gave the size of the letters, the width of the face of the sign, the depth of the sign, as well as the length.

Q. That was all contained, as I understand it, in the application, in the wording of it, but I understood you to say that you were obliged to furnish a rather definite sketch, giving details of construction. Please make that a little more definite.

A. Well, there was really no details. We were expected to make the sign so that when it was hung it would be safe as well as not be detrimental to the appearance of the street.

Q. Then do I understand that the Denver Electrical Company sign is the only one of these signs still in use to-day; that is, the only one of those that you have mentioned?

A. Yes, sir. That 5¢ sign at Colfax and Lipan was in use until about a month ago.

Q. You mean the one at West Colfax near Lipan?

A. Yes, sir.

Q. You state that was installed some time in 1911. Can't you make that more definite?

A. Which was that?

(Deposition of Thomas M. Norton.)

Q. The one at West Colfax near Lipan. At least, I understood you to say some time in 1911.

A. Well, I think it was the early part of 1911.
[81]

Q. But you have no way of fixing the date?

A. I haven't just right immediately; no, sir. I believe I can get the date.

Q. Did you testify that the sign was usually hung about the same time you got the permit?

A. The hanging permit; yes, sir.

Q. Did you get a hanging permit as well as an original permit; that is, were there two different permits that you obtained?

A. It was the application for a permit, and then they issue the permit on that application.

Q. But you wouldn't construct the sign, would you, until after you got the permit?

A. Oftentimes we did; yes, sir; where we knew the rules and knew our sign was within the rules we went ahead without the permit. For instance, in certain sections of the city they allow us to project the line six feet from the lot line. For instance, we had a hotel sign; we usually went down—we would go down and take out the permit, have it inspected, and then hang the sign. In that case the sign was made before the permit was asked for, and other signs—even special signs. When we knew we were strictly within the rules, the sign was made and finished before the permit was asked for.

Q. Has the city, so far as you know, always

(Deposition of Thomas M. Norton.)

granted these permits for signs to extend beyond the lot line?

A. As far as I know; yes, sir. On different streets they allow different projections.

Redirect Examination.

(By Mr. LOFTUS.)

Q. What has become of those permits that were issued?

A. Some of them were kept and some of them were not. We didn't feel that they had much value, and we didn't keep all of them. We still have some.

Q. Have you the one pertaining to the Denver Electrical Company's sign which is shown in photograph, exhibit "A-4"?

A. I am not sure. I would have to look that up.
[82]

Q. How long would it take to look?

A. I think we could find out this evening.

Q. I wish you would do so, and if you find it, produce it to-morrow, and likewise as to the New York Floral, the DuBois and the 5¢ sign. You mentioned submitting a sketch with the application for permit. Was that a sketch separately submitted, or one contained on the back of the application?

A. As a rule, it was simply contained on the back of the application.

Q. And what did that consist of—more than one view?

A. No, sir; just simply a rough sketch to show the lettering and the dimensions of the box and the size of the letters—not necessarily the size of the

(Deposition of Thomas M. Norton.)

letters; just simply show it didn't project beyond their limits and stayed within the requirements of their rules.

Q. Were any permits issued to you for the hanging of the May Company's signs in Denver?

A. No, sir.

Q. Why?

A. There is no permit required where it is inside of the lot line.

Q. These signs, as I understand it, were inside the store?

A. Yes, sir. There probably were electrical permits; I am not certain; but there were no hanging permits.

Q. What about the Littleton signs; were there any permits for those?

A. No permits required.

Q. When soliciting an order for a sign what did you show your prospective customer—a sample or a sketch, or what?

A. Sometimes we showed a sample; sometimes we showed the other signs, and then to show the sign to a little better advantage we would oftentimes make a sketch to scale; usually showed a sign as it would appear after it was finished, something as a photograph.

Q. Do you recall what was submitted to the Denver Electrical Company in procuring their order?

A. Yes, sir, I do; I remember the sketch. [83]

Q. How complete was that sketch?

A. Well, that simply showed the entire letter

(Deposition of Thomas M. Norton.)

above the bevelled surface and the part to be illuminated, but made no distinction—showed it as one open part of the letter the full width of the bevelled portion and the central part where the light shines through surrounded by a black surface.

Q. Had you succeeded in getting an order for this Denver Electrical Company's sign shown in photograph, exhibit "A-4," prior to the time you applied for a permit? A. Yes, sir.

Q. In other words, you wouldn't apply for a permit before you had shown the sign?

A. No, sir.

Q. How long did these permits usually hang fire or pend in the office of the Board of Public Works?

A. I think they read about seven days.

Q. That is after they are issued?

A. After they are issued, yes, sir.

Q. But from the time you apply for a permit, how long before it is granted?

A. It is granted when we apply as a rule. I don't quite get the meaning of the—

Q. When you turn in your application for a permit—

A. Well, that holds until you go down and give them the fee, when they issue your permit.

Q. And then the permit is issued when you give them your fee? A. Yes, sir.

Q. But prior to paying the fee there are some preliminaries to go through?

A. No, sir, not necessarily. You see before we would make that sign we would take it up and have

(Deposition of Thomas M. Norton.)

it O. K.'d by a member of the Art Commission, and then they would have to say that you could hang the sign after it was made. After it was completed you would make out an application for a hanging permit, and they would issue you that permit while you were there, on the payment of the fee.

Q. It would only be issued after all inspections were complete? [84]

A. Yes, sir; it would be issued after all inspections were complete.

Q. And before starting the construction of the sign you would apply for a permit?

A. A sign that we were not sure whether they would allow it to go up, but a standard sign that we felt sure that it was made according to their rules, we often made the sign before we asked for the permit to hang, as well as before the wiring inspection was asked for.

Deposition of Clark Rider, for Defendant.

Thereupon defendant called CLARK RIDER, who testified as follows:

My name is Clark Rider. I reside at 200 South Gilpin Street, Denver, Colorado. I am an electrical contractor and fixture dealer. My place of business is 137-139 Fifteenth Street. The business is carried on under the name of Denver Electrical Company. I am the owner. I have been in business in Denver since prior to 1910, under my management. I purchased two signs from the Prismatic Sign Co. of Denver. The latter one is in use to-day.

(Deposition of Clark Rider.)

It is now installed in the front of my building. It was erected as nearly as I can tell, about the 15th of October, 1912. It has not been changed in any respect since the time it was originally installed. It has been in use constantly since the time it was installed.

Cross-examination by Mr. O'BRIEN.

The sign is equipped for illumination. It is turned on whenever we have anything doing here; a parade, or anything like that. I can illuminate it. I have a switch on it. I can show you how it operates. There are lights inside of it, hanging down—inside the top of the border. They are fastened on the top inside of the sign. It is a box sign, you know, and they hang up in. I know the construction of it. The sockets are in the top. It is a box and the lights hang straight down from the top.

Q. Is there a separate piece of glass for each letter, or what sort [85] of transparent or translucent material is it?

A. Is there a separate piece of glass for each letter?

Q. Yes.

A. Now, I will have to look for a little technical point like that. It has been so long since it was put up that I don't remember.

Q. You don't know whether they are separate pieces of glass or one continuous piece of glass right along?

A. I would have to look at that. I wouldn't like

(Deposition of Clark Rider.)

to answer that point without looking at it, but I can look at it very shortly and see how that is done. There is little slide doors, and I can look in there and see how it is made very shortly.

Q. When do you say you purchased the sign?

A. Why, about the 15th of October, 1912.

Q. Why do you say "about"? Is that as nearly as you can—

A. I will tell you why. I am going from the time the permit was taken out. Say we hang up a sign to-day, maybe it may not be inspected to-day; it may not be inspected until to-morrow. See? But all electric signs you must have a permit. I would not have a permit for that sign if it would not be an electric sign. In this case it takes two permits; one for the man that hung the sign, and one for the man that does the electric work. If it had been a board sign I would not have needed to take out a permit at all, so there couldn't be only within a couple of days there from around about the 14th or 15th. The only thing I can go by is the permit. You know a man can't go back that far and testify to a thing for a certain day unless he looks up the record.

Q. What do you know about the permit?

A. That is the history of the permit at the City Hall; that is the day the permit was taken out.

Q. Haven't you anything to show what time the sign was delivered to you?

A. No, I can only take it from the time it was hung up, [86] you know—from the time the sign was hung up and connected up.

(Deposition of Clark Rider.)

Q. When was it paid for?

A. Well, now, I would have to go back quite a ways to look that up; I could find it.

Q. You could look that up?

A. I guess I could, but I would have to go back quite a ways. I have those papers at my house in my basement. In that time I guess I have had seven bookkeepers, but my papers from the time I started business is all out home. I could find it the chances are.

Q. Did you pay for it at the time it was delivered?

A. Oh, it wouldn't be paid just the day it was delivered. We don't pay for our stuff the day it is delivered. It would be paid within a reasonable time just like you know if you might have a cash—if I do business with you, you might have the cash, but we don't; we have an open account; we do business by the month. If we get a bill on the last of the month, we pay the 1st or the 15th of the next month. If the man needed the money badly I would pay him cash. I would pay it when it was put up if he needed the money.

Q. Whom did you deal with directly—what individual?

A. It was one of the Mackenzie brothers; I don't know which; I know the man when I see him; there is two of them, but I don't know what his given name was—couldn't tell you, but it was one of the sons. At the time the father was interested; I don't

(Deposition of Clark Rider.)

know whether he had any stock in the company at that time, but he was with them at that time.

Q. Were they doing business as the Prismatic Sign Company at that time? A. Yes.

Q. Did you make a contract with them to construct and install the sign, etc.?

A. Yes, they were to put up a certain sign for so much money.

Q. Have you that contract; is that contract in existence?

A. Oh, you mean a written contract that they would put it up for so much money? [87]

Q. Yes.

A. My recollection is—of course, it is a good while ago. At the time it was a verbal contract they were to put it up for so much money. I don't believe it was a written contract. It was to be put up for so much money. I don't think it was a written contract though. I ain't sure—couldn't answer that.

Q. Did you begin to use the sign just as soon as it was put up?

A. Yes. I bought the sign prior—I had bought the sign prior to October 15, 1912, because that would be the limit, you know, when a permit was taken out; the sign would be installed then you know. The sign was bought before that. They would have to make the sign. I don't know how long it took them to make it.

Q. Wouldn't they get the permit before they would make it?

(Deposition of Clark Rider.)

A. No, not the wiring part; it ain't necessary. If I wire a house it ain't necessary to get the permit until I want it inspected.

Q. But in order to install the sign—they couldn't install it without a permit?

A. No, they have got to have a permit before they can hang it. They can't hang the sign up until they get a permit, and I can't have the sign hung up either until I get a permit.

Q. Do you know what was the date of the permit for hanging this sign?

A. I say it is around about October 15, 1912.

Q. But that would necessarily have been obtained before the sign was hung?

A. It wouldn't need to. It could be taken out the same day. It could be taken out before if they wanted to, but they couldn't take out the permit after they hung the sign.

Q. Do you know the sign was hung the same day the permit was obtained? A. No.

Q. Do you know how long afterwards; it couldn't have been hung before, could it? A. No.

Q. It must have been hung after the permit was obtained? A. Yes, sure. [88]

Q. Have you any way of fixing the time that it was hung with reference to the time the permit was dated?

A. No, the only way I could do that is from the City Hall record. You see we don't get that permit—the hanging permit. We get a duplicate of the electrical permit. I could look that up, but it

(Deposition of Clark Rider.)

would take some time to look that up—to go back that far. I have it.

Q. You have the permit, have you?

A. Oh, yes, we get a duplicate you know. They keep one at City Hall and they give us one; that is for the electric wiring of the sign.

Q. So far as I know, no permits have as yet been put in evidence. Have you recently seen the permit for hanging this sign?

A. I have recently seen the record of it, yes.

Q. At the City Hall?

A. It came from City Hall, yes, the record of it.

Q. What did that record state with reference to the date? A. Why, October the 15th, 1912.

Q. Are you sure of that? A. Yes.

Q. Do they keep duplicates of the permits at the City Hall?

A. Yes, they have it all down there, when the sign was hung and when it was inspected. I had a record of that in my pocket. (Looking through papers taken out of pocket.) I may have left it at home, though. You can get that right off the books at City Hall. That is the best of my knowledge, October 15, 1912.

Q. How long did it take to install the sign after the workmen came here? A. Oh, to put it up?

Q. Yes.

A. Oh, that would be done the same day. It wouldn't take long to put it up.

Q. They had to make electrical connections, did they not?

(Deposition of Clark Rider.)

A. Well, we made that; we made the electric connections; we made that in a couple of hours.

Q. But you can't state now the date the sign was actually brought [89] here to be installed, can you, Mr. Rider?

A. No, I can't, not now. That is a little too far back for me.

Q. Might it not have been as late as October 20, 1912? A. No, it couldn't be that late.

Q. Why do you say it couldn't be?

A. Well, by the records of the permit, because I know the city wouldn't allow you to hang a sign up unless you have a permit. That is the law. You can't take a chance.

Q. I know, but they wouldn't compel you to hang it on any particular day after the permit was issued?

A. After you get the permit you can hang it any day you want to.

Q. Yes, but they didn't compel you to hang it the day the permit was given, so how do you know it was not hung four or five days after the permit was given?

A. We don't hang signs; we do the wiring of it.

Q. Yes, but I want to know if possible, Mr. Rider, and it is really somewhat important in this case or I would not be interrogating you, just when the sign was hung as nearly as you can state. Now, of course, if you can't state exactly, I want to find out what the best of your knowledge is, and my question is, can you state positively that it was not

(Deposition of Clark Rider.)

hung or installed as late as the 20th of October, 1912? A. No, I don't think it was that late.

Q. But you can't say that it was not that late?

A. No. To the best of my knowledge it was around about the 15th, to the best of my knowledge.

Q. The 20th wouldn't be far from the 15th, would it, Mr. Rider?

Mr. LOFTUS.—Objected to as immaterial.

A. No.

Q. Have you ever had the sign repaired since it was installed?

A. Only painted and put in new lamps, of course; that is all.

Q. Did it work satisfactorily from the very start?

A. Yes. [90]

Q. Do you know how long the city of Denver has permitted the hanging of signs which project over the lot line above the sidewalk?

A. As I have said before, we don't have anything to do with hanging signs. We only wire signs, and get a permit to have it inspected; that is all. We don't need to go into that.

Q. You have to get the permit yourself, do you, to have it inspected?

A. That is all. That is a different department at the City Hall, the electric department, but we don't have anything to do with hanging the sign at all.

Q. No, but what I want to know is do you have to obtain the permit, the inspection permit I might say, or do the people that sell you the sign have to get that permit?

(Deposition of Clark Rider.)

A. No. I have to get that if I wire it, but if they were doing their own wiring, *they* they would have to get it.

Q. They didn't do any electric work at all?

A. Not at that time. They may later on have done their own electric work. Of course, naturally, my being in the business, I wouldn't let anyone else wire a sign that was going up in front of my business unless I wire it myself.

Q. Was this the first sign of this appearance that was erected here, so far as you know?

A. I bought two signs off of them. I bought one before that, a small sign for a different address.

Q. But that was not of this construction?

A. Yes, it was similar, but they had a flat letter instead of a concave letter, if I am not mistaken. It was a prismatic sign though, a short one.

Q. That is, installed by the Prismatic Sign Company? A. Yes.

Q. (Question read to the witness.) "But that was not of this construction?"

A. To the best of my knowledge. If you will examine that letter, the lower line now is flat. It is not a concave; the upper letter is; and to the best of my knowledge the other sign was, both the Denver Electrical—both line was flat. [91]

Redirect Examination.

(By Mr. LOFTUS.)

Q. What do you mean by a concave letter, Mr. Rider?

A. Well, I mean by tilting it the right way. I

(Deposition of Clark Rider.)

don't know whether you would call it a concave letter or not—a letter that is sunk in. In other words, it is—I don't know whether I can draw it the way I see it in my eye.

Q. Do you mean it has a raised moulding?

Mr. O'BRIEN.—Objected to as leading.

A. The first one, there is a hole cut in it, leaving the light through. The first letter, to the best of my knowledge, was what is called a flat letter—flat, you know. Now, the next one—this one here—that is a different design. It is—you might call it a bevelled letter. It is sunk in anyway. That is out of my line, that there letter business. It is a—I can't just explain myself rightly on that, but I can sort of draw a picture of it.

Q. Will you please make a sketch of the raised letter.

A. Well (drawing on a piece of paper), that is something—I have a designer here that can make it, but I can't. I employ a designer to make pictures, but I can't make them myself. I think we can boil this letter business down considerably here. If I get the right definition of it here—can you tell from that what that there means there—what I mean by a raised letter? This letter (indicating by drawing on paper) is higher here (indicating) than the face of the sign; it extends out and it also slopes in; from the outer edge of the letter it slopes in to the center.

Q. Prior to buying one of these signs yourself,

(Deposition of Clark Rider.)

that is, with the raised moulding, had you seen any of them installed?

A. That is the first one I ever seen. The first I bought was the first one I ever seen, and that was the first raised letter I ever seen.

Q. How did you come to purchase this sign from the Prismatic Sign [92] Company?

A. Well, they thought I was in a good place here to advertise a sign for them. They was just going in business, and I made an agreement with them for so much money, and I was doing a little wiring for them, don't you know, doing a little wiring, and that applied on the sign.

Q. Did they show you a sample of this sign before you purchased it?

A. Yes, they had a sample of it; yes.

Q. Did the sample have the raised moulding?

A. Now, I can't tell you that. You mean the last one or the first one?

Q. The last one. In other words, was the sample you saw like the letters in the upper line of your present sign? A. I couldn't answer that question.

Q. Can you fix approximately the date when you agreed to purchase this sign? That is, how long before it was finally installed?

A. I can't go back that far.

Q. Was it a matter of months?

Mr. O'BRIEN.—Objected to as leading.

A. Oh, no, no. To the best of my knowledge it was within thirty days.

(Deposition of Clark Rider.)

Q. Who showed you these dates on the permits that you mentioned in your cross-examination?

A. Why, I can't tell you the man's name unless I look on my record.

Q. Where was he from?

A. From Denver as far as I know. He might have been outside so far as I know.

Q. He wasn't from San Francisco?

A. No, I don't think—I think he was from Denver so far as I know.

Q. What kind of a looking man was he?

A. Well, he was a heavy set man, about—

Q. What did he say to you; do you remember what he told you?

A. Well, he asked me what dates this sign was put up, and I told him as near as I could tell him around about October 15, 1912. [93]

Q. And he had with him a record of those dates, did he?

A. Yes, and then when I looked at the record I said "Now, that is just as near as I can tell." He asked me what date the sign was hung, and all those same questions you are asking me, and I couldn't tell him. All I could do was go through the dates of the record.

Q. Did he tell you whom he was representing?

A. He says that he was an attorney.

Q. Was his name Griffin, G-r-i-f-f-i-n?

A. I believe that was the name as near as I can tell you. I am not positive about that name.

Q. How long ago was he in here?

(Deposition of Clark Rider.)

A. About a week ago.

Q. You said that you had done wiring for the Prismatic Sign Company. Do you recall any signs that you wired? Can you state what those signs were? A. The same kind of signs as this.

Q. Do you recall one reading "New York Floral Co."?

Mr. O'BRIEN.—Objected to as leading, also as improper redirect examination.

A. No, I couldn't tell you what names they were now.

Q. I show you a statement rendered to Mackenzie Bros. on billhead of the Denver Electrical Company, dated August 15, 1912, and ask if you can identify that?

Mr. O'BRIEN.—Objected to as not proper redirect examination. A. Yes.

Q. What does that statement represent—what sort of works?

Mr. O'BRIEN.—Same objection.

A. To wiring—to work on a prismatic sign.

Q. Was that statement rendered by your company?

Mr. O'BRIEN.—Same objection.

A. Yes.

Q. At the date shown thereon? [94]

Mr. O'BRIEN.—Same objection.

A. Yes.

Q. And do you recall what kind of a sign that was?

Mr. O'BRIEN.—Same objection.

(Deposition of Clark Rider.)

A. A prismatic sign.

Q. And was that the same kind of a sign that you have in front of your building here?

Mr. O'BRIEN.—Objected to as leading and improper redirect.

A. Same construction.

Q. (Mr. LOFTUS.) The statement identified by the witness is offered in evidence as Defendants' Exhibit "A-5."

Mr. O'BRIEN.—Introduction of the exhibit is objected to as entirely immaterial, also as a part of improper redirect examination, and entirely incompetent, apparently having nothing whatever to do with the questions involved in this suit.

Q. I note an item on that statement, exhibit "A-5," reading as follows: "Permit, \$2.00"; what does that refer to?

Mr. O'BRIEN.—Same objection.

A. Well, that is for permit you must pay to have a sign wired.

Q. That is a permit you get from the city?

Mr. O'BRIEN.—Same objection.

A. Electric permit, yes.

Q. And you apply for that and pay for the issuance of it?

Mr. O'BRIEN.—Same objection.

A. Yes.

Q. That would be shown in the records at City Hall?

Mr. O'BRIEN.—Same objection.

A. Yes, sir.

(Deposition of Clark Rider.)

Q. And would have been issued prior to the date of that bill?

Mr. O'BRIEN.—Same objection to all these questions. [95]

A. Yes, you would have to get the permit before you would render a man a bill.

Q. How was that permit issued—in your name?

Mr. O'BRIEN.—Same objection.

A. Denver Electrical Company.

Q. And a copy of that is given to you and one retained by the city; is that the system?

Mr. O'BRIEN.—Same objection.

A. Yes, sir.

Q. Is the name of the sign stated on the permit?

Mr. O'BRIEN.—Same objection.

A. Not necessarily.

Q. Do you know whether or not the permit is issued before the inspector comes around?

Mr. O'BRIEN.—Same objection.

A. It must be.

Q. It must be issued before the inspector comes around?

Mr. O'BRIEN.—Same objection.

A. Yes.

Q. I show you a copy of an electrical inspection certificate which has been offered here in evidence as a part of exhibit "A-1," and which reads as follows:

Permit No. 2894

"To the Honorable Board of Public Works:

The electric wiring on the sign to be installed at
526 16th Street owned By NEW YORK FLORAL

(Deposition of Clark Rider.)

CO., has been inspected and approved by this department.

Inspected—8-17-12.

Inspector—Oliver.

(Signed) JNO. MALM,
City Electrician."

Have you ever seen a similar permit or the original of that copy?

Mr. O'BRIEN.—Objected to as improper redirect and also as irrelevant and immaterial.

A. Yes.

Q. Did you have anything to do with the wiring referred to in that permit? [96]

Mr. O'BRIEN.—Same objection.

A. Yes, we done the wiring and got the permit.

Q. Do you recall that sign, "New York Floral Co."?

Mr. O'BRIEN.—Same objection.

A. No.

Q. What is there about the permit that enables you to say that you did the wiring on that job?

Mr. O'BRIEN.—Objected to as leading and improper redirect.

A. Well, I will tell you; I was doing their wiring at that time.

Q. Then, to the best of your recollection, the permit referred to in the statement, Exhibit "A-5," is the one shown by Exhibit "A-1"; is that correct?

Mr. O'BRIEN.—Same objection.

A. What are you going to number this one here? There are two different permits there.

(Deposition of Clark Rider.)

Q. That is a part of "A-1."

A. Well, don't you have this one numbered too?

Q. The notary does that.

A. You have two permits from two different places, one electric permit and the other for hanging the sign.

Q. The electrical inspection certificate is the one referred to. (Question read to the witness.) "Then, to the best of your recollection, the permit referred to in the statement, Exhibit 'A-5,' is the one shown by Exhibit 'A-1'; is that correct?"

A. I couldn't answer that.

Q. You haven't looked your records up for the purpose of testifying here?

Mr. O'BRIEN.—Same objection.

A. No, sir, I have not.

Mr. O'BRIEN.—Without waiving my objections, I will ask the witness a question or two on recross-examination.

Recross-examination. [97]

(By Mr. O'BRIEN.)

Q. Mr. Rider, when Mr. Loftus asked you what was the construction of the work that you did the wiring on, represented by exhibit "A-5," I understood you to say the same construction, meaning the same construction as the sign now installed above your store. By that you didn't mean the same construction of letter, did you?

A. Which is exhibit "A-5"?

Q. This one. (Above question read to the witness.) A. No.

(Deposition of Clark Rider.)

Q. You simply meant it was an electrical sign, wasn't that the idea?

A. Yes. I couldn't testify whether it was a flat or a raised letter.

Q. It might have been one or the other, or both?

A. It might have been one or the other.

Redirect Examination.

(By Mr. LOFTUS.)

Q. Any way that you can find out what this sign was that is referred to in the statement exhibit "A-5?"

Mr. O'BRIEN.—Objected to as improper redirect.

A. None now that I know of.

Q. There is no way that you know of now?

A. Not now; no.

Q. Who was doing the actual wiring at that time, you or someone in your employ?

Mr. O'BRIEN.—Objected to as leading and improper redirect.

A. I can't answer that.

Q. Did you have men working for you at that time?

Mr. O'BRIEN.—Same objection.

A. I had.

Q. Did you send them out on jobs of wiring at that time?

Mr. O'BRIEN.—Same objection.

Q. Yes, but I don't remember the man's name now that wired the sign any more. [98]

Q. You don't recall doing it yourself?

(Deposition of Thomas M. Norton.)

Mr. O'BRIEN.—Same objection.

A. No.

Mr. LOFTUS.—During the recess the letter O in the sign of the Denver Electrical Company, illustrated in photograph, exhibit "A-4," has been removed under the supervision of the witnesses Mackenzie and Norton, and in the presence of counsel for plaintiff.

**Deposition of Thomas M. Norton, for Defendant
(Recalled).**

THOMAS M. NORTON, being recalled, testified as follows:

Direct Examination.

(By Mr. LOFTUS.)

Q. Have you since you were last on the stand removed a portion of the sign of the Denver Electrical Company shown in photograph, exhibit "A-4"?

A. Yes, sir; I helped remove it. There were two of us working on it.

Q. Have you that portion with you?

A. Yes, sir; I have.

(Witness produces letter O.)

Mr. LOFTUS.—The letter O removed from the Denver Electrical Company's sign, just produced by the witness, is offered in evidence as Defendants' Exhibit "A-6."

Mr. O'BRIEN.—Objected to as incompetent, irrelevant and immaterial, and also as not having been properly identified.

(Deposition of Thomas M. Norton.)

Mr. LOFTUS.—In view of counsel's last objection, based on want of identification, I will now ask him to state upon the record whether or not he was present at the time this letter was removed, and also to state whether or not the said letter has been constantly in his view since that time. This is a question to Mr. O'Brien.

Mr. O'BRIEN.—I was present at the time of the removal of the exhibit "A-6," but I can't say that I have had the exhibit constantly in view since its removal, and I will further state that I decline to go on the stand as a witness, and decline to answer any more [99] questions. If counsel wants evidence he must get it from his witnesses and not from me.

Mr. LOFTUS.—Counsel for plaintiff is requested to state any particular time when the said letter was out of his view since the time it was removed.

Mr. O'BRIEN.—Counsel for plaintiff declines to answer any more questions. I have made all the statement I care to make.

Q. Is this letter O in the same condition that it was when you originally constructed the sign, that is, so far as the metal part?

A. The metal part is the same.

Q. And the glass? A. Yes, sir.

Q. You don't know of any changes or differences?

A. No, sir; none whatever in the metal construction. The bevelled surface of the moulding is painted white instead of the original aluminum color.

(Deposition of Thomas M. Norton.)

Cross-examination.

(By Mr. O'BRIEN.)

Q. Who made that change, if you know, Mr. Norton?

A. I don't know who painted it, but the work was done for the Denver Electrical Company.

Redirect Examination.

(By Mr. LOFTUS.)

Q. Mr. Norton, how like or how different to this letter O of Defendants' Exhibit "A-6" were the letters in the signs which you constructed for the New York Floral Company and the DuBois sign, concerning which you testified yesterday?

Mr. O'BRIEN.—Objected to as not proper re-direct.

A. It is the same construction all the way through.

Q. You don't note any differences in construction?

Mr. O'BRIEN.—Same objection.

A. No, sir.

Q. Did the New York Floral Company sign and the DuBois sign [100] employ the same moulding as is shown in Defendants' Exhibit "A-6"?

Mr. O'BRIEN.—Same objection. Also objected to as leading.

A. Yes, sir.

**Deposition of Archibald Mackenzie, for Defendant.
(Recalled).**

ARCHIBALD MACKENZIE, being recalled,
testified as follows:

Direct Examination.

(By Mr. LOFTUS.)

Q. Since you last testified were you present at the time Defendants' Exhibit "A-6" was removed from the sign of the Denver Electrical Company in this city? A. I was.

Q. I call your attention to this exhibit and ask you to state whether or not it is in the same condition regarding its construction as when you originally constructed the sign? A. It is.

Q. Do you note any changes whatever in construction? A. No, sir.

Q. How does this construction shown in Defendants' Exhibit "A-6" compare with the construction of the letters in the signs which you built for the New York Floral Company and Mrs. Dubois, concerning which you have previously testified.

Mr. O'BRIEN.—Objected to as leading.

A. Same construction.

Q. Any difference at all?

A. I would say not.

Q. Did those signs, namely, the New York Floral Company and the one for Mrs. Dubois, have the same kind of moulding or border which is shown in Defendants' Exhibit "A-6"?

Mr. O'BRIEN.—Objected to as leading.

A. They did.

Mr. O'BRIEN.—No cross-examination.

Mr. LOFTUS.—At this time defendants offer in evidence photostat copies of each of the following original documents taken from the records of the Board of Public Works of the city of Denver: application No. 2935 or a permit to erect a sign covering the New York Floral installation, including three sheets, to wit: front and [101] reverse sides of the application and certificate of the Electrical Inspection Department accompanying same, which the notary is requested to mark Defendants' Exhibit "A-7"; similarly photostat copies of application number 2951 for a permit to erect a sign covering the DuBois installation, consisting of three sheets as follows: front side application, reverse side of same and certificate of inspection of the Electrical Inspection Department accompanying same, which the notary is requested to mark Defendants' Exhibit "A-8"; and photostat copies of application No. 2984 for permit to erect sign covering the Denver Electrical Company installation, and consisting also of three sheets, to wit: front and back of application and certificate of inspection of Electrical Inspection Department, which the notary is requested to mark Defendants' Exhibit "A-9."

Mr. O'BRIEN.—The introduction in evidence of the Exhibits "A-7," "A-8" and "A-9" is objected to as incompetent, irrelevant and immaterial, but no objection is made on the ground that photostat copies are offered instead of the originals.

Mr. LOFTUS.—It is stipulated that the original exhibits, after being properly marked by the notary, may be kept in the custody of the attorney for defendants, subject to inspection by attorneys for plaintiff at all times, and with the understanding that they will be produced at the hearing.

Defendants' Exhibit "A-1."

ELECTRICAL INSPECTION DEPARTMENT.

City and County of Denver.

Permit No. 2894.

To the Honorable Board of Public Works:

The electric wiring on the sign to be installed at 526-16th Street, [102] owned by NEW YORK FLORAL CO., has been inspected and approved by this department.

Inspected: Date—8-17-12.

Inspector—Oliver.

(Signed) JNO. MALM,
City Electrician,
S.

**APPLICATION FOR A PERMIT TO ERECT
SIGN.**

Denver, Colorado.

No. 2935.

To the Board of Public Works, City and County
of Denver:

Please issue to Prismatic Sign Co. subject to the authority conferred by the Rules and Regulations of the Board of Public Works a permit to erect electric sign 12 ft. long by 3 ft. wide, and 7 inches

deep from the premises occupied by New York Floral Co.

Said sign to be erected in front of premises located at 526-16th Street and not to project more than 2 feet from lot line at outermost point of sign, as more fully appears by sketch on back of this paper.

Sign to be put on top of cornice and project 2 feet from lot line.

The privilege is asked for within 7 days from date and we estimate it will probably be — months before any other sign in the same place will be required for the purpose of inspection. The work to be done subject to your rules and directions, and the general laws and ordinances of the city, and at our risk for any and all loss or damage occasioned to the City, either directly or indirectly, and the amount of any judgment thereby obtained against said city shall be conclusive evidence of our liability.

PRISMATIC SIGN CO.

By A. MACKENZIE.

O. K.—SETH BRADLEY,

President.

(Indorsed on side:)

Received of The Prismatic Sign Co. 50¢ to cover cost of permit, Aug. 19, 1912.

ALLISON STOCKER,

Treasurer.

By B.,

Deputy. [103]

Defendants' Exhibit "A-2."

ELECTRICAL INSPECTION DEPARTMENT.

City and County of Denver.

Permit No. 3259.

To the Honorable Board of Public Works:

The electric wiring on the sign to be installed at 757 Broadway, owned by Mrs. DU BOIS, has been inspected and approved by this department.

Inspected, Date—9-3-12.

Inspector—Oliver.

(Signed) JNO. MALM,
City Electrician.
S.

**APPLICATION FOR A PERMIT TO ERECT
SIGN.**

Aug. 27, 1912.

Denver, Colorado.

No. 2951.

To the Board of Public Works, City and County
of Denver:

Please issue to Prismatic Sign Co. subject to the authority conferred by the Rules and Regulations of the Board of Public Works a permit to erect electric sign 17 ft. long by 3½ ft. wide, and 7 in. deep from the premises occupied by Mrs. DuBois.

Said sign to be erected in front of premises located at 757 Broadway street, and not to project more than 5 ft. from lot line at outermost point of sign, as more fully appears by sketch on back of this paper.

No. of lights—15. [104]

The privilege is asked for 7 days from date, and we estimate it will probably be several months before any other sign in the same place will be required for the purpose of inspection. The work to be done subject to your rules and directions, and the general laws and ordinances of the city, and at our risk for any and all loss or damage occasioned to the city, whether directly or indirectly, and the amount of any judgment thereby obtained against said city shall be conclusive evidence of our liability.

PRISMATIC SIGN CO.

By A. MACKENZIE.

O. K.—SETH BRADLEY,

President Board of Public Works.

(Indorsed on side.)

Received of Prismatic Sign Co. 50¢ to cover cost of permit, Sept. 3, 1912.

ALLISON STOCKER,

Treasurer.

By P., Deputy.

Defendants' Exhibit "A-3."

ELECTRICAL INSPECTION DEPARTMENT.

City and County of Denver.

Permit No. 3794.

To the Honorable Board of Public Works:

The electric wiring on the sign to be installed at 137-15th St., owned by DENVER ELECTRICAL

CO., has been inspected and approved by this department.

Inspected, Date—10-14-12.

Inspector—Thorn.

(Signed) JNO. MALM,
City Electrician.
S. [105]

APPLICATION FOR A PERMIT TO ERECT
SIGN.

Denver, Colo., July 31st, 1921.

Nö. 2984.

To the Board of Public Works, City and County of
Denver:

Please issue to Prismatic Sign Co. subject to the authority conferred by the Rules and Regulations of the Board of Public Works a permit to erect electric sign 24 ft. long by 32 inches wide, and 6 inches deep, from the premises occupied by Denver Electrical Co. Said sign to be erected in front of premises located at 137—15th Street and not to project more than 18 inches from the lot line at outermost point of sign, as more fully appears by sketch on back of this paper.

The privilege is asked for 7 days from date, and we estimate it will probably be several months before any other sign in the same place will be required for the purpose of inspection. The work to be done subject to your rules and directions, and the general laws and ordinances of the city, and at our risk for any and all loss or damage occasioned to the city, either directly or indirectly, and the amount

of any judgment thereby obtained against said city shall be conclusive evidence of our liability.

PRISMATIC SIGN CO.

G. A. MACKENZIE.

O. K.—SETH B. BRADLEY,
President.

(Indorsed on side.)

Received of Prismatic Sign Co. 50¢ to cover cost of permit, Oct. 15, 1912.

ALLISON STOCKER,
Treasurer. [106]

Defendants' Exhibit "A-5."

C. Rider

R. H. Edwards

Denver, Colo., 8-15-12, 191—.

Electric Wiring and Repairing High-
grade Gas and Electric Fixtures
Estimates Promptly Given.

Mackenzie Bros.

757 Broadway.

Debtor To

THE DENVER ELECTRICAL CO.

137 15th Street.

Phone Main 1986.

Terms: Cash

To wiring sign,

1 conduit	.....	.40	
1 ft. conduit	.....	.10	
Tape	.....	.20	
2 locknuts	.....	.05	
1 bushing	.....	.05	
Permit	.....	2.00	
Time	.....	1.50	4.30

[107]

Deposition of Paul D. Howse, for Defendant.

Thereupon defendant called PAUL D. HOWSE, who testified as follows:

My place of residence is 3223 West Adams Street, Los Angeles, California. I am 47 years old; president of the Electrical Products Corporation, manufacturers of electrical signs, located at 1128-34 West 16th Street, Los Angeles, California, since 1912. I submitted a bid for an electric sign for the White Sewing Machine Agency in Los Angeles in February or March, 1914. I fix this date by reason of the fact that I opened the factory in November, 1913, the previous year. I presented a sketch but our bid was rejected in favor of one made by C. J. Wallace, who made the sign. It was erected on an alley side of the east door on the Sixth street side of the Hollingsworth Building, at Sixth and Hill Street. I first saw this sign about May 1st, 1914, in operation. I fix the date by reason of the fact that the White people did not reply to our bid. When I came by there I saw the sign had been put up by Wallace. I was unable to find any records in the City Electrician's office concerning this sign, as the City Electrician informed me the City did not keep anything back of five years.

Q. Did you look at any other place for records under date of the installation of this sign?

A. I went to see the present White Sewing Machine Agents.

DQ. No. 19. What did you learn there?

(Deposition of Paul D. Howse.)

A. I learned that the agency had changed hands and that they had no records.

DQ. No. 20. Have you ever examined this sign closely? A. I have.

DQ. No. 21. Please describe it.

A. It is a sign reading "White" vertically, built of galvanized iron and wood; the letters are cut out and around the letters are placed a raised border with a moulding tapering inward and across the face of the letters, from the back is placed a coarse screen. [108]

DQ. No. 22. How is that screen held in place?

A. It is held in place by clips on the back of the face of the sign.

DQ. No. 23. What is the purpose of this screen?

A. To diffuse the light.

DQ. No. 24. Is that sign still in use? A. It is.

DQ. No. 25. At what address, if you know?

A. 818 South Broadway, Los Angeles.

DQ. No. 26. When did you last see it?

A. I drove by there this morning and saw it there.

DQ. No. 27. I hand you a photograph for identification which has been marked Defendants' Exhibit "A," and I ask if you recognize or can identify the device shown thereby (document handed to witness).

A. Yes, sir; that is the sign to which I referred.

DQ. No. 28. Similarly I hand you a photograph which is marked Defendants' Exhibit "B," for identification, and I ask if you can identify or recognize the device shown therein?

(Deposition of Paul D. Howse.)

A. Yes, sir; that shows a part of the letter "T," and all of the letter "E," on the sign.

DQ. No. 29. Do you remember when these photographs were taken?

A. Those photographs were taken in November, in October or November of 1920.

DQ. No. 30. By whom were they taken, if you know?

A. They were taken by Bentley, the photographer for "The Evening Herald."

By Mr. LOFTUS.—Counsel for plaintiff is informed that the White Sewing Machine Agency sign is in use on a building within four blocks from where this testimony is being taken and he is invited to accompany counsel for defendants to the location of this sign and examine the same if he so desires.

By Mr. GRIFFIN.—It is no part of the requirement of the taking of this testimony that counsel for plaintiff proceed to any [109] other place than the taking of this testimony for an examination of any witness or object.

By Mr. LOFTUS.—Plaintiff's counsel well knows that the sign is a large, bulky affair and could not well be transported to this room for the purposes of examination and cannot conveniently be offered in evidence. The two photographs identified by the witness are offered and introduced in evidence as Defendants' Exhibit "A," and Defendants' Exhibit "B," respectively, and opportunity is now given counsel for plaintiff to visit the actual

(Deposition of Paul D. Howse.)

sign for the purpose of comparing the photographs thereof and making timely objection to any inaccuracies that might be present.

By Mr. GRIFFIN.—The offer is objected to as secondary evidence, insufficiently proven of the sign in question.

DQ. No. 31. (By Mr. LOFTUS.) Were there any other electric signs of this nature erected by Wallace, in the city of Los Angeles, to your knowledge?

A. Yes, there were a number of them.

DQ. No. 32. Can you name any of them?

By Mr. GRIFFIN.—I object to the question as indefinite as to time and move to strike out any answer thereto unless the time is fixed.

DQ. No. 33. (By Mr. LOFTUS.) Now, read the question. (Question read by the reporter.)

A. With the exception of this one sign, all have been destroyed, or removed, although I know where some of them were erected during the early part of 1914.

DQ. No. 34. Where were those other signs erected?

A. One was erected on a hotel on the west side of Main street, between Fifth and Sixth streets.

By Mr. GRIFFIN.—I move that the answer be stricken out because of uncertainty as to the time when this sign was erected. I further object to any hand-made alteration of the photograph being offered in evidence.

DQ. No. 35. (By Mr. LOFTUS.) Referring, now, to photograph [110] Defendants' Exhibit "B,"

(Deposition of Paul D. Howse.)

what is the part which I have just marked with the letter "A"?

A. That is the moulding for outline of the letter, the vertical outside stroke of the letter.

DQ. No. 36. What is the part which I have just marked with the letter "B"?

A. That is the coarse screen placed behind the face of the sign.

DQ. No. 37. What is the face of the sign? Of what material is the face of the sign constructed?

A. Either black or galvanized iron.

DQ. No. 38. Are you familiar with the practice in Los Angeles and elsewhere with regard to electric signs of this type, with particular reference to sidewalk illumination?

By Mr. GRIFFIN.—That question is objected to as incompetent, irrelevant and indefinite.

A. Yes.

DQ. No. 39. What is the practice in so far as the illumination of the sidewalk is concerned?

By Mr. GRIFFIN.—That question is objected to as incompetent, irrelevant and immaterial.

A. In the city of Los Angeles, where signs illuminate from the interior, they are placed around marquis or what is known as metal hanging canopies. For a number of years, the city electrician required that the bottoms be left out of the signs so as to illuminate the sidewalk from the same lamp which illuminated the sign.

DQ. No. 40. How long has this been the requirement of the city ordinance?

(Deposition of Paul D. Howse.)

By Mr. GRIFFIN.—That question is objected to as it has not been shown that any ordinance with respect to this matter is in existence. The question is further objected to as leading.

DQ. No. 41. (By Mr. LOFTUS.) Question withdrawn. To your knowledge how long has it been the practice to leave the bottom out of [111] the sign so as to illuminate the sidewalk?

By Mr. GRIFFIN.—The question is objected to as incompetent, irrelevant and immaterial and upon the further ground that it tends to prove no material issue in this case.

A. That was the requirement by the city electrician when we first started hanging signs in Los Angeles, about April of 1912, and such requirement remained in effect up until about three years ago, when we induced the city electrician to make it optional whether we should leave the bottom out or cut out part of the back out, either method obtaining the same effect, and that is still in effect.

DQ. No. 42. Are there any other cities where you do business having a similar requirement with regard to omitting the bottom from a sign so as to illuminate the sidewalk?

A. Yes, the city of Seattle.

DQ. No. 43. How long, to your knowledge, has this been the requirement in Seattle?

A. To my knowledge, it has been the requirement there for five years. Previous to that time we had not been in business in Seattle and I do not know what the requirement was, but the Seattle ordinance

(Deposition of Paul D. Howse.)

applies to all electrical signs extending over the walk, and it was optional whether we should leave the bottom out or put glass in the bottom to obtain the effect of lighting the sidewalk from the same lamp that lighted the sign.

By Mr. LOFTUS.—Direct examination closed.

Cross-examination.

(By Mr. GRIFFIN.)

Cross-Question No. 1. The moulding shown you in the White Sewing Machine patent is made of wood, is it not? A. It is.

XQ. No. 2. And you know that the principal objection to that sign is that the wood moulding breaks off and splits and warps so that it makes a very bad looking sign, do you not?

A. The wood moulding stayed in place for three years, about three years, on that sign, [112] and my impression is it was knocked off from a blow on the face of the sign. It was formerly hung in an alley way opposite Jevne's store, where a great many deliveries are made, and we were asked once to replace that moulding, but we were not given the job.

XQ. No. 3. And you know, that on new electric signs made at the present time, that the electric departments do not allow the use of wood in the construction of such signs, do you not?

A. The electric departments in Los Angeles will allow the use of wood removed a certain distance from the wiring, but not on the interior signs.

(Deposition of Paul D. Howse.)

XQ. No. 4. But that is an objection to a sign, having any wood about it?

A. My personal opinion is that a sign should not have any wood about it.

XQ. No. 5. How do you fix this date of the construction of this sign as May, 1914?

A. I had opened a factory in November of 1913, and I started out soliciting myself; when I got the factory going, I started out the week after the first of the year, and handled the down town territory for a period of about five months, and it was during that time that this sign was put up. Along in June of 1914, I discontinued the down town territory as a sales field, so that I know it was previous to the first of June.

XQ. No. 6. Mr. Tucker, who is also down as a witness to testify at this hearing, is employed in your company?

A. He is, at the present time; yes, sir; but he was not at that time.

XQ. No. 7. You have expressed very serious doubt to many people about this patent of Hotchner's regarding this sign with raised metal moulding, have you not? A. I have not.

XQ. No. 8. Have you not spoken to some one connected with the Greenwood Advertising Company concerning the patent?

A. Oh, it is possible that I may have had a conversation with someone about it. [113]

XQ. No. 9. Didn't someone solicit you to sell for the Hotchner signs?

(Deposition of Paul D. Howse.)

A. No, sir; they did not.

XQ. No. 10. Did they not show them to you, a salesman?

A. No, sir. I never saw it until—that particular sign—until one of them was put up.

XQ. No. 11. Now, with respect to these signs that you say were built with the bottom left open, can you place any such sign? A. Yes.

XQ. No. 12. At the present time? A. Yes.

XQ. No. 13. Where?

A. There is one on a bank marquise at the opposite end of this block, that is, on Fourth and Main, on the Fourth street side. There is the “Roma Cafe” on Hill street; there are others around town but I do not have them in mind right now.

XQ. No. 14. There are signs on marquise?

A. Yes.

XQ. No. 15. As distinguished from a swinging electrical sign?

A. We have no swinging signs down here. Our projection is a permanent fixture.

XQ. No. 16. And this illumination was simply from the edge of the marquise and not from the bottom of an electric sign?

A. No. It was from the bottom of the electric sign. The electric signs are planted on the marquise; that is the way the constructed marquise extend; then the signs are fastened on the side.

XQ. No. 17. Where is this “Roma Cafe”?

A. That is about No. 618 South Hill Street.

XQ. No. 18. 618?

(Deposition of Paul D. Howse.)

A. Well, about that number, yes.

XQ. No. 19. And when were those signs put up?

A. That sign was put up about two years ago.

XQ. No. 20. When was the other one—

A. (Interrupting.) The bank sign was put up about six years ago.

XQ. No. 21. Any other signs like that?

A. Yes, there is a number of them; quite a few have been put up and then taken down afterwards.
[114]

XQ. No. 22. You do not know of any sign at the present time that was put up prior to 1914, of that character?

A. Well, it is very hard to fix the date. There are lots of them, but I can't recall them right now. We have frequently left the bottoms out of signs for that purpose, both on marquise and otherwise.

XQ. No. 23. But you cannot give any example of any such sign put up prior to 1914, at the present time?

A. I haven't any in mind unless it is that bank sign I spoke of was put up previous to that time.

XQ. No. 24. But you don't know that it was put up prior to that time?

A. No, I am not sure. My impression was it was put up after 1914.

By Mr. GRIFFIN.—That is all.

Redirect Examination.

(By Mr. LOFTUS.)

Redirect Question No. 44. Where is Mr. Wallace now, if you know? A. I do not know.

(Deposition of Paul D. Howse.)

RDQ. No. 45. When did you last see him?

A. About 1914.

By Mr. LOFTUS.—I have nothing further.

Recross-examination.

(By Mr. GRIFFIN.)

Recross-Question No. 25. You are the agent for the Flex Lume Letters?

A. Why, I do not know whether you would call it agent or not; the Electrical Products Corporation owns the patent as applied to territory west of the rocky mountains.

RXQ. No. 26. And you lease or otherwise dispose of territory for the northern part of the state and districts— A. (Interrupting.) Yes. [115]

RXQ. No. 27. To the Federal Electric Sign System? A. Yes.

RXQ. No. 28. And that particular type of letter is the competitor of the type of letter that is referred to in this—

A. (Interrupting.) I don't regard it as such.

RXQ. No. 29. Nevertheless, it is a competitor and is applied in exactly the same manner as the letters and for the same sign purposes, is it not?

A. Read the question again, please. (Question read by the reporter.) Well, that would depend on the personal viewpoint.

RXQ. No. 30. Well, we will put it this way: If you found a man with a sketch of a sign which was to have the Hotchner letters installed in it, you would not hesitate to tell him that your letters, the

(Deposition of J. E. Tucker.)

Flex Lume letters would make a better sign for that same purpose, would you?

By Mr. LOFTUS.—That is objected to as incompetent, irrelevant and immaterial, calling for the opinion of the witness.

A. The letters are wholly different. On the Hotchner letters you speak of, they raise the bead; on our letters, the letter itself is raised; the stroke of the Hotchner letter is much wider than the stroke of the Flex Lume letter.

RXQ. No. 31. I understand that thoroughly; that is not what I am asking you. I am asking you if you would not consider that if you found a man endeavoring to buy one of the Hotchner signs with the raised border letter, if you would not undertake to sell him for the same purpose a sign with the Flex Lume letter? A. Yes.

Deposition of J. E. Tucker, for Defendant.

Defendant thereupon called J. E. TUCKER, who testified as follows:

My name is J. E. Tucker, Senior; age 54 years; local address, Los Angeles, California. I am connected with the Electrical Products Corporation in the Sales Department. It is a manufacturer [116] of electrical signs and accessories. I have been in the electrical sign business since January, 1913, connected with the Greenwood Advertising Company. I was in the position of Vice-President and General Manager of that company and handling the sales. I solicited the White Sewing Machine

(Deposition of J. E. Tucker.)

Agency of Los Angeles for an electrical sign in the year 1914. I cannot state positively the month, but it must have been by the middle of the year. I did not succeed in selling a sign to them. I afterward saw a sign—an electrical sign—on their building, which I have seen since many times. It consists of a vertical sign, the letters having a wire mesh with something of a raised edge to it—something of a wooden construction, perhaps, in appearance, with a bold finish. The front of the sign was made of metal with a smooth surface.

DQ. No. 16. What was the purpose of the mesh, as you mentioned?

A. I can't really see any purpose, only to diffuse the light.

DQ. No. 17. How was that mesh held in place?

A. I am not positive of that but I think it was soldered.

DQ. No. 18. Have you since seen that sign?

A. Yes.

DQ. No. 19. When did you last see it?

A. I saw it a great many times at this present location.

DQ. No. 20. Where is it located at the present time, if you know?

A. To the best of my recollection, it is on Broadway, between Eighth and Ninth.

DQ. No. 21. I show you a photograph, which has been offered here in evidence as Defendants' Exhibit "A," and I ask if you recognize the device pictured therein? A. Yes.

(Deposition of J. E. Tucker.)

DQ. No. 22. Please tell us what that is?

A. That is the sign that we referred to.

DQ. No. 23. I show you another photograph marked Defendants' Exhibit "B," and I ask you if you recognize the device pictured therein?

A. Yes, that is the type of letter that I referred to. [117]

DQ. No. 24. Who, if you know, erected that sign?

A. I positively do not know who erected it; I know who I was told was manufacturing it at that time; whether he erected it or not is a question in my mind.

By Mr. LOFTUS.—I think that is all. The direct examination is through.

Cross-examination.

(By Mr. GRIFFIN.)

Cross-Question No. 1. You have spoken of the raised moulding on this sign; you know, of course, that that raised moulding was made of wood?

A. It has that appearance, yes.

XQ. No. 2. And that wood very easily cracks and breaks and warps and falls off a sign as illustrated by the photograph Defendants' Exhibit "B"?

A. Why, I would judge that it would, in time, crack and warp, or something of that nature.

XQ. No. 3. And you don't know exactly when this sign was installed?

A. Not the exact month, I could not tell you.

By Mr. GRIFFIN.—I guess that is all.

By Mr. LOFTUS.—Nothing further.

Deposition of C. E. Heft, for Defendant.

C. E. HEFT, a witness, being called upon behalf of the defendant, testified as follows:

My name is C. E. Heft. I am 39 years of age. I reside at 480 East Mill Street, Portland, Oregon, and work for the Portland Elevator Co., Portland, Oregon. I am Vice-President of that company. I have charge of the outside work, and have been with that company a little over ten years, since October, 1911. [118] Prior to October, 1911, I was employed with the Oregon Hotel Company a little over two and a half years. I left there September 15, 1911. I have seen the monthly time book of the Hotel Oregon. I find my signature there in lots of places, especially on pages 201 and 202, showing that I was paid up to the 16th of September, 1911. John Anderson succeeded to my place as Chief Engineer with the Oregon Hotel Company. I quit September 16, 1911.

Q. And you were succeeded on that day by Mr. Anderson? A. Yes.

Q. H. Anderson, it says here?

A. Yes, I think his name is Hans.

Q. He took your position as chief engineer of the Oregon Hotel Company? A. Yes.

The book identified by the witness was thereupon offered in evidence by counsel for the defendants and the same was marked Defendants' Exhibit "AA," and it is returned herewith and made a part hereof.

Mr. PECK.—I desire to call particular attention to pages 201 and 202 of this exhibit, which are the

(Deposition of C. E. Heft.)

pages which have been referred to by the witness.

Q. Were you chief engineer of the Oregon Hotel Company and employed by the Oregon Hotel Company after September 11, 1911? A. No.

Q. And your next business was with this elevator company? A. Yes.

Q. Have you any documentary evidence which shows when you went into this mill and elevator business?

A. I have merely a little contract here which was drawn up among ourselves which shows the date on which I bought my stock, which was October 2, 1911. Between the time I left the Oregon Hotel, which was September 16th, and this date, October 2d, I was not working.

Q. Then started in to working for the Portland Elevator Company on [119] October 2, 1911?

A. Yes, I started in with the Portland Elevator Company on October 2, 1911.

Mr. PECK.—The witness does not wish to part with this paper which he has handed me, and we wish to submit the same to counsel as an exhibit and ask if a copy may be made by the notary public and certified to as such and substituted for the original as an exhibit in this case and marked.

Mr. GRIFFIN.—There is no objection to that. Thereupon the paper identified by the witness was offered in evidence by counsel for defendants and the same was copied and certified by the notary public, and marked Defendants' Exhibit "BB," and it is hereto attached and returned herewith. No objection was made thereto.

(Deposition of C. E. Heft.)

Q. Mr. Heft while you were chief engineer of the Oregon Hotel Company prior to September 16th, 1911, did you have occasion to build a hotel sign for that company? A. Yes, I built it.

Q. Where was that sign installed?

A. That sign was hung on the corner of the hotel building facing what was then Seventh and Stark Streets, it is now Broadway and Stark Street, Seventh Street having been changed to Broadway.

Q. And the Oregon Hotel building stands on what corner?

A. On the northwest corner of Broadway and Stark Streets in Portland, Oregon.

Q. And the sign you refer to was made and hung on the southeast corner of that building? [120]

A. Yes.

Q. How was it facing?

A. Facing the intersection of the street.

Q. When did you hang that sign there?

A. As to the exact date I could not say. I know that the sign was completed and hung just before I left working for the Oregon Hotel Company. I would say it was hung and lighted for the first time between the 10th and the 15th of September, 1911.

Q. How do you fix that time?

A. Well, at the time we were doing the last work on the sign in regard to hanging and connecting it, Mr. Anderson, the man who is now the engineer for that hotel was sent to me with a view of getting the position I had and that I was leaving. I remember when he came in to see me that I left my work

(Deposition of C. E. Heft.)

on the sign and taking him in and introducing him to Mr. Wright and Mr. Dickinson, and that was between the 13th and 15th of September, 1911, as near as I can remember, because he was there only a day or two previous to his starting to work for the company.

Q. You were working on this sign when Mr. Anderson was employed to succeed you?

A. We were working on the sign, just completing it and getting it ready to hang, and just completed it and had it hung and lighted just before he started to working for the hotel.

Q. Who built that sign? A. I built it.

Q. State in a general way the construction of the sign.

A. Well, the sign is built of galvanized iron throughout. It is built in sections with letters on three sides mitered in on the back to fit the shape of the building. The letters are built up of channel [121] sections throwing the letter out from the surface. I don't remember the exact dimensions of these, but that leaves a wide space around the edge of the letter about an inch which are gilded with glass back of the raised part of the letter. The lamps were hung in just back of the letters allowing the lights to shine through and across the glass.

Q. Were the letters built separate and apart from the galvanized sides?

A. Each letter was built independently and fastened on.

Q. How were they fastened on?

(Deposition of C. E. Heft.)

A. As I remember it they were fastened on with stove bolts and soldered.

Q. How were these letters made?

A. The letters were simply made out of galvanized iron, each section of the letter being cut from patterns that were laid out so that the corners were mitered together and pieces were bolted on from sheet metal leaving a flange at the bottom raised up from the surface of the sign something like an inch and a half and then turned back somewhere about one inch with the edge turned under for reinforcement and each corner where the edges came together was joined and soldered together.

Q. What was the approximate width of the flange at the bottom?

A. It was between three-quarters and one inch, as I remember it.

Q. Was not the flange at the bottom wider than the flange at the top?

A. It might have been. [122]

Q. The metal came out at right angles from the flange at the bottom about an inch and a half, do you think? A. Something like that.

Q. And turned back in the same direction as the flange at the bottom about an inch? A. Yes.

Q. And turned up for the purpose of reinforcement? A. Yes.

Q. And every separate section of each letter was made in that same way? A. Yes.

Q. And the sections joined together?

A. Each section was joined at the corner making

(Deposition of C. E. Heft.)

a complete letter independently of its back-ground.

Q. How was the face of the flange?

A. The face was open with a gilded band, of gold or bronze, to stand out very brilliant as the light strikes it, I suppose for daylight.

Q. How was the glass fastened that was placed behind the letter in connection with the letter and the lights?

A. The letters each had a separate glass and they were fastened in with little metal clips.

Q. How were these metal clips fastened to the frame work?

A. I am not sure as to the exact method of fastening them, but as I remember it now they were soldered.

Q. You don't remember whether they were fastened on with stove bolts or not?

A. No, I could not remember.

Q. There was a separate glass for each letter?

A. Yes.

Q. How was that glass frosted?

A. This man under whose direction this sign was built had some process by which he frosted it with a paint mixture of some sort. I am not sure what it was.

Q. Who was that man?

A. He was a painter who was at that time employed by the Oregon Hotel Company for re-decorating and repainting [123] the building and furniture; his name was Merwin, or something like that.

(Deposition of C. E. Heft.)

Q. A. L. Merwin? A. Yes.

Q. Did he have plans for this sign?

A. He furnished all the drawings and gave all the instructions for making it.

Q. Where is this man Merwin now?

A. I don't know.

Q. How long has it been since you have seen him?

A. I have not seen him for seven years.

Q. Have you heard from him during that time?

A. No, I have never been in communication with him at any time.

Q. Where are these original plans?

A. No doubt they are in his possession. He had all the plans and working models of this sign in his possession at the time we built it.

Q. I hand you what purports to be a photograph of a sign and ask you if you recognize that photograph? A. I do.

Q. What is it?

A. It is a photograph of that sign we have been talking about which is on the corner of the Oregon Hotel building.

Q. Is that a correct representation of that sign?

A. It is.

The photograph identified by the witness was thereupon offered in evidence by counsel for the defendants and the same was marked Defendants' Exhibit "CC," and the same is returned herewith and made a part of this deposition.

Mr. PECK.—I now submit this photograph, Defendants' Exhibit "CC" to counsel and ask if there

(Deposition of C. E. Heft.)

is any objection to the proof of the photograph?

Mr. GRIFFIN.—There will be no objection to the photograph if it is also identified by the other witnesses called.

Mr. PECK.—I will also have it identified by the other witnesses I call. And we also wish the record to show that [124] before offering this photograph we have referred counsel to the particular sign in place for his examination.

Q. I also hand you what purports to be an enlargement of the upper portion of the sign shown on Defendants' Exhibit "CC" and ask you if you recognize that? A. I do.

Q. What is that a photograph of?

A. That is a photograph of the same sign that I built and that was placed on the corner of the Oregon Hotel building and is the same sign which I have been testifying about.

The last photograph identified by the witness was thereupon offered in evidence by counsel for the defendants and the same was marked Defendants' Exhibit "DD," and the same is returned herewith and made a part of this deposition.

Mr. GRIFFIN.—I will make the same statement in respect to this exhibit that I did in respect to the other; that there will be no objection to the proof if it is identified by the other witnesses.

Mr. PECK.—And we will engage to have it as well as the other identified by the other witnesses. We wish the record to show that our reason for asking counsel at this time as to any possible ob-

(Deposition of C. E. Heft.)

jection is due to the fact that the photographer who took the pictures is here in town and can be called as a witness at this time, and the reason that he has not been called, and the reason that counsel has not been served with notice as to his deposition is simply to save time and expense to both parties.

Mr. GRIFFIN.—I understand that and there will be no objection on that account.

Q. Has this sign concerning which you have testified as having been hung by you in September, 1911, been hanging in position at the same place at all times since that date up to the present time? [125]

A. Yes.

Q. Is it just the same now as it was when you hung it?

A. I can see no change in it whatever.

Q. Have you noticed it from time to time?

A. Yes.

Q. You have lived here in Portland all the time?

A. Yes and I have probably looked at it a thousand times since I hung it up.

Q. And it is hanging there to-day?

A. Yes, it is there as far as I know. I have not seen it to-day, but I imagine it is there.

Cross-examination of Mr. HEFT by Mr. GRIFFIN.

Q. This sign, "Oregon Hotel," is what is known as a channel letter sign with outside flanges, is it not? A. I suppose that would be a name for it.

Q. And the only difference between this sign and the ordinary channel sign with the lights in the channel is that you put glass in back of the channel

(Deposition of C. E. Heft.)

and put the lights in that section?

A. That would be one difference. A sign could be built the same as this with the lights inserted in the groove between the channel.

Q. And these flanges that form the sides of the channel are the same shape of metal with the outside flanges bent out of this same shape of metal to produce a flange about an inch wide? A. Yes.

Q. Were these flanges made from the body of that metal or were they separate pieces?

A. The completed letter is a separate piece of metal independent of the body.

Q. And made separate from the body and secured thereto after the openings have been cut in the body?

A. Yes.

Q. Are you engaged in any way in the installation of electric signs? A. No, sir.

Q. Or have anything to do with electric sign industry? A. No. [126]

Q. Have you ever installed any other electric signs since the time you installed this one?

A. No.

Q. Are you familiar with the sign on the Artisan's building in the next block below the Oregon Hotel? A. I am not.

Defendants' Exhibit "BB."

February 5, 1921.

Notary Public for Oregon.

"Factory Phone Main 1537.

(Member of the)

(United Metal Trades)

(Association of the)

(Pacific Coast.)

PORTLAND ELEVATOR CO.

5 and 7 North First Street.

Passenger and Freight Elevators.

Machinists.

Electricians.

Millwrights.

Portland, Oregon, Oct. 2nd, 1911.

Agreement between Chas. Heft and H. W. Johnson, A. W. Grover and A. L. Enos. In consideration of six (6) shares of the Capital Stock of the Portland Elevator Company, which A. W. Grover, H. W. Johnson and A. L. Enos, the only stockholders of the Company agree to sell to him, the said Chas. Heft agrees to pay to the three people above mentioned the sum of \$600.00 in payments as follows:

\$350.00 cash and \$50.00 per month until same is paid for in full.

Upon payment of the total amount, stock certifi-

cates will be delivered to him and recorded upon the books of the Company.

(Signed) A. L. ENOS.

(Signed) C. E. HEFT.

(Signed) A. W. GROVER.

(Signed) H. W. JOHNSON.

In case of the failure to make payments as above specified the stock still unpaid for shall revert to the original holders." [127]

THIS CERTIFIES that the above and foregoing is a true, correct and complete copy of the paper identified by the witness and offered as an exhibit in this case, this copy to be substituted therefor.

Notary Public for Oregon.

My commission expires May 12, 1924.

Deposition of H. C. Anderson, for Defendant.

H. C. ANDERSON, called upon behalf of defendant, testified as follows:

My name is H. C. Anderson. Age, 49. Chief Engineer, Oregon Hotel. Residence, 1117 Arnold Street, Portland, Oregon. I have been Chief Engineer of the Oregon Hotel Co. since September 15, 1911. I recognize the book marked Defendant's Exhibit "AA." It is the book we signed when we got our checks. My name appears on Page 201. I succeeded Charles Heft in that position. I recognize Defendant's Exhibit "CC" as a photograph of the corner of the Oregon Hotel, six stories up, showing the sign on the corner. It is a true representation of the sign.

(Deposition of H. C. Anderson.)

Q. How long has that sign been in place there on that corner?

A. That was put on the corner there between the first of September and along about the middle of September, 1911.

Q. How do you fix that date?

A. I applied for the position when I heard Mr. Heft was going to leave. I called in and made application and I went down in the engine-room afterwards and Mr. Heft was showing me a sign he was just finishing up. I went away and did not hear anything more from them after I put in my application until I came along there about the 10th or the 11th of September, and they were putting this sign up then. Mr. Heft asked me then if I had seen Mr. Dickinson [128] or Mr. Wright and I said no, I have not. He said they had been trying to locate me, and that they would want me to go to work right away and I went in and saw Mr. Wright and he engaged me.

Q. They were putting the sign up that day?

A. Yes, and the sign was up and going when I started to work a few days after that on the 15th.

Q. Has it been up there in place at all times since? A. Yes.

Q. And not changed? A. No.

Q. I will show you Defendants' Exhibit "DD" and ask you what that is?

A. That is a part of that same sign.

Q. Is that a true representation of that sign?

A. Yes it is.

(Deposition of H. C. Anderson.)

Q. You had nothing to do with the making of that sign, did you, Mr. Anderson?

A. No, it was completed and up there when I went to work.

Q. Have you ever had anything to do with renewing the lights in it?

A. I did not renew the lights. I think they have carbon lights put in. I think new lights were put in when we started the new hotel and started putting the sign across the street.

Cross-examination by Mr. GRIFFIN.

Q. Are you familiar with the sign on the Artisan's building on the next block?

A. I have not noticed that.

Deposition of J. C. Zanker, for Defendant.

J. C. ZANCKER, a witness produced upon behalf of defendants, being duly sworn, testified as follows:

My name is J. C. Zanker; age 36 years; residence, Seattle, Washington, and I am the Northwest manager for the Federal Electric Company. I have been in that position about five years, having been in charge of the office in Portland, Oregon, until about a year ago, and since then at Seattle. I have been connected with [129] the electric sign business with Forster & Kleiser as a salesman in 1908 and 1909. I was then in business for myself and then manufactured signs. I have always been able to draw sufficient plans to manu-

(Deposition of J. C. Zancker.)

facture and design electric signs. I have designed electric signs ever since I have been in the business, some twelve or thirteen years. I have made drawings and sketches for electric signs. Defendants' Exhibit "CC" is a photograph of the electric sign on the corner of the Oregon Hotel in Portland, Oregon. It is a true representation of the sign. I saw it yesterday. This sign was up when I was with Foster & Kleiser, and there is a record of the time when I quit working for them.

Q. Did you know about this sign at that time; when you were working for Foster and Kleiser?

A. Yes, I did.

Q. Is there any way you can identify that date or time that was?

A. The reason I remember so distinctly about it is because it was in my territory at that time and I was working for Foster and Kleiser and we were naturally a little bit peeved because we did not get the work of putting the sign up as that was the business we were doing, and I think a man by the name of Miller had something to do with it; he was with a construction gang at that time, and I think he is with Foster and Kleiser now. Offhand I cannot fix the date.

Q. Is there no way you can fix the date?

A. I have no record to which I can refer that will give you the absolute date.

Q. You know it was during the time you were working for Foster and Kleiser here in Portland?

A. Yes. I started to work for them along in

(Deposition of J. C. Zancker.)

1908 or 1909 and was with them for about five years.

Q. Then you would know that it was between 1908 and 1914? A. Yes, I know that. [130]

Q. Has the same sign been in the same place at all times since then? A. Yes, it has.

Q. And is exhibit "CC" a fair representation of that sign? A. It is.

Q. I hand you Defendants' Exhibit "DD" in this case and ask you what that is?

A. This is an enlarged photograph from the smaller one marked Defendants' Exhibit "CC," showing the top half of the sign only.

Q. Did you cause these photographs to be taken?

A. Yes.

Q. When was this enlargement made, Defendants' Exhibit "DD"?

A. On Wednesday of this week (February 2, 1921).

Q. Is Defendants' Exhibit "DD" a fair representation of the portion of the sign as the same is in place? A. It is.

Q. When was the original photograph made, Defendants' Exhibit "CC"?

A. About two months ago.

Q. And you caused that to be taken? A. Yes.

Q. Have you examined the sign recently with reference to its mechanical aspects? A. Yes.

Q. When?

A. I did that on Wednesday of this week.

Q. How did you examine the sign?

(Deposition of J. C. Zancker.)

A. I had a man bring a ladder down there and I went up on the ladder and took measurements, etc.

Q. How high is this sign?

A. About 23 feet and 9 inches.

Q. What is the construction of it?

A. Galvanized iron and glass.

Q. What is the shape?

A. What I would call a box vertical sign.

Q. What is the width of the sides of the sign?

A. Approximately 21 inches for the sides and approximately 23 inches for the face.

Q. Have you made a rough sketch of the sign?

A. Yes.

Q. Have you brought it with you?

A. I have. This is it.

Q. Was this drawing made from measurements?

A. Yes.

Q. And from measurements made by you?

A. Yes. [131]

Q. Is it drawn to scale? A. It is.

Mr. GRIFFIN.—I don't want to object to it and I think he could explain it. It does not seem to be correct.

The WITNESS.—I have drawn this to show the three sides on a flat surface. Just as if I had opened it up and laid the three sides down flat instead of making three drawings.

Q. As I understand you wanted to show three sides on one drawing? A. Yes.

Q. And it would be impossible to show three sides from one perspective in that way and so you

(Deposition of J. C. Zancker.)

opened it out in that way on the drawing?

A. Yes.

Q. This is drawn to scale? A. Yes.

Q. One foot to the inch? A. Yes.

Q. You have shown here a center letter H on this drawing in detail; please explain why you made it that way?

A. The way this letter is constructed?

Q. Yes, in accordance with your drawing.

A. This letter H is taken out of the middle of the design from the word "Hotel"; it has a raised channel border around the letter; the flange on the channel is about one inch wide; the channel is one and three-eighths deep; with an opening on the face of two inches. This opening is covered with glass frosted with white paint on the back. Each of the letters are made the same way as the center letter H on the drawing.

Q. You have only drawn one letter out complete?

A. Yes.

The sketch identified by the witness was there-upon offered in evidence by counsel for defendants and the same was marked Defendants' Exhibit "EE," and the same is returned herewith and made a part of this deposition.

Q. Did you make any sketch of the interior mechanism of the sign. A. Yes. [132]

Q. Have you it here?

A. I have it. This is it.

The sketch identified by the witness was there-upon offered in evidence by counsel for the defend-

(Deposition of J. C. Zanecker.)

ants and the same was marked Defendants' Exhibit "FF" and the same is returned herewith and made a part of this deposition.

Q. Explain figure 1 of Defendants' Exhibit "FF"?

A. Figure 1 shows the way the lighting is arranged behind the letters. The socket is fastened on to a brace. This brace has two holes in it with a cable running down through the holes securely fastened, permanently fastened to one side leaving the other side loose, with this cable passing over a pulley at the top so as to lower and raise the lamps for changing the globes.

Q. As I understand by disconnecting the wires on the battery of lights all of the battery of lights can be dropped down by means of the cable from the pulley at the top? A. Yes.

Q. That was for what purpose?

A. That was for the purpose of illuminating the sign.

Q. What does Figure 2 represent?

A. Figure 2 shows one of the letters as to the glass and shows how the glass is fastened in the sign, and each letter is made the same way.

Q. Has each letter a separate glass? A. Yes.

Q. And each glass frosted as you have described in your testimony? A. Yes.

Q. What is Figure 3?

A. Figure 3 shows the bottom and top construction for the frame binding the sign together.

Q. What are these angle bars on the sides?

(Deposition of J. C. Zancker.)

A. These angle bars are used to help hold the glass in position.

Q. And also braces for the purpose of strengthening the sides and holding the sides in place?

A. Yes.

Q. What has been your observation and your experience in the sign [133] business with reference to the practice of illuminating the sidewalks and streets from electric signs placed upon buildings?

Mr. GRIFFIN.—The question is objected to unless the time is definitely stated.

Mr. PECK.—If anything develops I will connect up the time.

A. On all interior lighted signs in the city of Seattle,—there was an order that went into effect along about 1909 that all signs had to be left open on the bottom so that the light from the inside of the sign would reflect down onto the sidewalk to help light up the streets.

Q. Has that order been in force ever since 1909 in Seattle?

A. It has been in effect and we had to follow it until here recently and they are not living up to it now.

Q. What about the bottom construction of this particular sign on the Oregon Hotel building; was that open, or otherwise?

A. The bottom of that sign was left open.

Q. Have you any particular signs in mind directed to any particular time and place where the

(Deposition of J. C. Zancker.)

bottom has been left open for the purpose of street illumination?

A. There is the O. E. Evans sign in Seattle on Second Avenue in front of the O. E. Evans clothing store. And the sign in front of the King Brothers clothing store on Second Avenue near Seneca Street in Seattle which have the bottoms left open.

Q. Do you know when either of these signs were put up?

A. Yes, the King Bros. sign was put up in 1917.

Q. Have you in mind any particular signs anywhere which were up prior to October, 1912, which had the bottoms open for the purpose of illuminating the street?

A. The Seattle Oyster House sign on Pine Street between First and Second in Seattle, Washington.
[134]

Q. When was that erected?

A. Prior to 1912.

Q. Is that sign still up?

A. No, sir, it was taken out a year ago last November.

Mr. GRIFFIN.—I move that all reference to the King Bros. sign be stricken out of the record because of the fact the witness says the sign was put up three years after the patent application was applied for.

Q. Have you at this time any other signs in mind?

A. I don't remember any others.

Q. What was the construction of the Seattle Oyster House with reference to illuminating the street?

(Deposition of J. C. Zancker.)

A. That had the bottom left open. The letters were of flat opal glass, and the sign was of galvanized iron construction illuminated from the interior.

Q. How was the street illuminated?

A. Through the reflection of the light from the interior reflecting down on the sidewalk through the open bottom of the sign.

Q. The bottom of the sign was left open?

A. The bottom of the sign was left open.

Cross-examination of Mr. ZANCKER by
Mr. GRIFFIN.

Q. The company you are working for is either a branch or otherwise directly connected with the defendant corporation in this case? A. Yes.

Q. And you are engaged in selling a sign, in addition to the sign claimed to be an infringement in this case, known as the Flexlume sign, are you not?

A. We use a letter that is called Silveray embossed letter manufactured by the Federal Electric Co. in manufacturing some of our signs. [135]

Q. And these signs with that letter come in direct competition with the letters and construction used in the sign in suit? A. Yes.

Q. Are you familiar with the letters known as the Hotchner illuminated or Novelty illuminated letters, are you not? A. Yes.

Q. You have seen signs made with those letters? A. Yes.

Q. The sign in question reading "Oregon Hotel" does not at all appear the same as the Novelty

(Deposition of J. C. Zancker.)

letters would appear in such a sign, does it?

A. Yes, I would say they are of the same construction and have the same appearance.

Q. That is, you want the Court to believe that a channel letter with an outstanding flange in front of the sign body and parallel to the sign body has the same appearance as the Novelty letters which show a raised moulding adjacent to the edges of the character letters and which have no flange parallel to the body spaced away from the body of the sign; is that what you mean?

A. Yes, it has the same appearance.

Q. You mean to say that a letter having a flat flange spaced away from the body of the letter appears the same as the letter without such flat flange? A. Yes.

Q. You recognize, of course, the mechanical difference between the two letters, do you not? That is, in the "Hotel Oregon" sign there is a small or channel-like structure with flat flanges on the outer edges of the channels, while in the so-called Hotchner letters, the subject matter of one of the patents in suit here, the edges of the letter characters are provided with mouldings of an entirely different kind from that?

A. Both the Hotchner letters and the letters in the Oregon Hotel sign are of the channel type with raised border effect around them.

Q. You recognize no mechanical difference between the two things?

A. They both have the same effect. [136]

(Deposition of J. C. Zancker.)

Q. That is not what I am asking you, Mr. Zancker. Do you or do you not recognize the mechanical difference between the two constructions? A. No.

Q. You think they are both of the same mechanical construction?

A. I consider they are of the same appearance.

Q. Do you or do you not consider that they are of the same mechanical construction; the one having a channel with flanges on the outer edges of the channel parallel to the body of the sign spaced away from the body and the other having a moulding frame over the body of the sign at the edges of the letter characters?

A. Yes, I would think they would have the same mechanical construction and appearance.

Q. Then you consider a letter with a flange spaced away from the body of the sign and parallel thereto the same thing as a letter not having a flange spaced away from the body of the sign?

A. I would say that the letters that you have referred to as your Hotchner letters and the letter in question on the "Oregon Hotel" sign would have the same appearance, yes.

Q. But that is not my question; I ask you if you recognize the mechanical difference?

A. No, I do not recognize any mechanical difference.

Q. This O. E. Evans sign that you spoke of in your direct examination which is in Seattle, Washington, was installed subsequent to 1914, was it not?

A. It was installed three or four months ago.

(Deposition of J. C. Zancker.)

Q. About this order in Seattle for leaving signs open, was that a general order, an ordinance or regulation, or made in some form or record that could be obtainable or ascertainable?

A. That was an order that had to be followed out in the department of streets and sewers for the construction of signs. [137]

Q. Was it a verbal order given in that department?

A. I would not say whether it was a verbal order or a written order. It was given to us verbally and had to be complied with, otherwise they would not give us a permit.

Q. You never installed any signs in compliance with that order prior to 1914, did you? A. No.

Q. And your reference to the Seattle Oyster House sign which you said was left open, but which does not now exist; have you any idea where that is now?

A. That was rebuilt and used on his other store.

Q. You say it was erected prior to 1912?

A. Yes.

Q. How do you know it was?

A. The proprietor of the store told me it was.

Q. That would be a matter purely of hearsay with you?

A. All I know about it is what he told me. I have his word for it.

Q. Of your own knowledge you know nothing about the erection of that sign?

A. I could not swear that the sign was erected prior to 1912 only by his saying it was.

Deposition of Archibald Mackenzie, for Defendant.

Thereupon the defendant called ARCHIBALD MACKENZIE, who testified as follows:

My name is Archibald Mackenzie. I reside at 1290 Bellaire Street, Denver, Colorado. My present occupation is painting and decorating. I have been engaged in that occupation for about 26 to 28 years. I am now 42. I have constructed and erected electric signs in Denver from 1910, about five years; almost exclusively in the electric sign business at that time. I was connected with the Prismatic Sign Company as one of the copartners. The other partner was Thomas M. Norton. We first opened a shop at 1808 Arapahoe Street. We then went to 757 Broadway, and then to Spear [138] Boulevard and California; 621 B. St. they called it. We specialized on a sign we called the Prismatic sign. We built all kinds of electric signs. The Prismatic sign was a sign with a metal face, an opening cut out, and a rib glass placed over the opening to catch the rays of light. We bent up a flange rim, flaring to the inside, fitted with a letter.

The sign was illuminated with electric bulbs inside of the box back of the letters. It was not an outward-flaring sign.

Q. Approximately how many of such signs did you construct and erect during the existence of the Prismatic Sign Company?

Mr. GRIFFIN.—The question is objected to unless it is shown that the signs erected were prior to October, 1912.

(Deposition of Archibald Mackenzie.)

Mr. LOFTUS.—Go ahead and state approximately how many of that type of signs your company put out during the existence of the company.

A. I should say not over a dozen up to 1912. From 1911 until it went out of business it put up in the neighborhood of 75 or 80. I can make a cross-section showing one of the letters of the Prismatic sign. This is a rough sketch showing the moulding, with the glass inside, and this is the face of the letter to the outside. (The witness writes the names of the parts upon the diagram.) The metal rim was soldered on the face of the sign. It was made of galvanized iron. The glass was flat to cover the entire letter; a plain sheet of glass put in back of the letter.

The sketch was offered in evidence as Defendants' Exhibit "M-A."

Mr. GRIFFIN.—The sketch is objected to as insufficient and incomplete, and as insufficiently identifying the construction of the sign, and as secondary evidence.

A. I first erected a sign of the type of the sketch for the Denver [139] Electrical Co., 137 15th Street, in December, 1911.

Q. Had you constructed and erected any of these signs in any town or city outside of Denver prior to this time? A. In Littleton, in 1912.

Mr. GRIFFIN.—I object to the question and answer unless it was shown that the sign was erected prior to October, 1912.

Mr. LOFTUS.—How many of such signs did you

(Deposition of Archibald Mackenzie.)

erect in the town of Littleton, Colorado?

A. We put two up in Denver in 1912, one in July and one in August, the same type of sign.

Q. The question was as to Littleton, Colorado.

A. Littleton was right along the same date, the same year. There were two signs, one "drugs" and one "bar."

Q. Can you state approximately when these two signs in Littleton were erected?

A. During the summer months; to the best of my recollection it was along in July or August.

Q. What year? A. 1912.

Q. How are you able to fix the date as being July or August, 1912?

A. We were not allowed to put signs in Denver of that type; that is, they were not allowed to extend out into the sidewalk; we had to keep them within a foot of the building, anything outside of an electric sign lined with electric bulbs, there was an ordinance to that effect. We were not allowed to do business at that time, up until 1912, only allowed to put a flat sign on a building.

Q. How are you able to fix the time as being July or August?

A. It was in the summer months.

Q. Any particular reason for saying it was in the summer months?

A. Well, those two signs in Littleton my brother-in-law sold; he went out in the machine, and I remember I got a horse and wagon and drove out and put them up; it was warm weather; I could

(Deposition of Archibald Mackenzie.)

not positively say just what month it was in; it was in the summer months.

Q. Do you recall the names of the merchants for whom those two [140] Littleton signs were erected?

A. The name of the man for whom the "drugs" sign was erected was named Thompson; my recollection is the Neef Brewing Co., of Denver, ordered the "bar" sign put up; I could not say positively.

Mr. GRIFFIN.—Q. The Neef Brewing Co., of Littleton?

A. Yes, sir; I could not say positively; my recollection is that it was the Neef Bros. Brewing Co.

Mr. LOFTUS.—Q. Who was the "drugs" sign for? A. For Ralph Thompson.

Mr. GRIFFIN.—Q. That was in Littleton?

A. In Littleton.

Mr. LOFTUS.—Q. I hand you a photograph containing an illustration of a sign showing the word "drugs" and ask if you can identify the same?

A. I can.

Q. Please tell us what it is.

A. Ralph Thompson's Drug Store at Littleton.

Q. In what town?

A. Littleton; this sign when hung projected from the building.

Q. Is that a sign of the type that we have just been discussing? A. It is.

Q. When was that photograph taken, if you know (handing witness photograph)?

A. Just shortly after it was hung; we always

(Deposition of Archibald Mackenzie.)

made a practice of having a photograph taken as close to the time when it was hung as possible.

Mr. LOFTUS.—Photograph identified by the witness I offer in evidence as Defendants' Exhibit "M-2."

Mr. GRIFFIN.—The photograph is objected to as insufficiently identified, and upon the further ground that there is no proof as to the date of the erection of the sign, nor any proof as to the date of the taking of the photograph.

Mr. LOFTUS.—Q. When, with reference to the Denver electrical signs which you mentioned, was this sign which is shown in [141] photograph Defendants' Exhibit "M-2" erected, before or after? A. After.

Mr. GRIFFIN.—Q. The Denver electrical sign was erected after this one?

A. They were right along, pretty close together. I was just trying to think. It is that Denver electrical sign you have reference to?

Mr. LOFTUS.—Yes.

A. (Continuing.) The Denver electrical sign, the first one we built was erected previous to that; that was in 1911.

Q. How many signs did you construct and erect for the Denver Electrical Company? A. Two.

Q. When was the first one erected?

A. In December, 1911.

Q. Do you mean that it was started at that time or finished at that time?

A. That is the time it was hung, finished.

(Deposition of Archibald Mackenzie.)

Q. How are you able to fix that date?

A. From the city records.

Q. Have you recently looked at the city records to determine the date? A. I have.

Q. And what was the date that you ascertained?

A. December, 1911; I don't just remember the day of the month.

Q. What sort of a record was this which you looked at?

A. City record permit to hang the sign.

Q. Who issues those permits?

A. The City Clerk.

Q. You stated that you erected a second sign for the Denver Electrical Co. When was it erected?

A. About six months later, to the best of my recollection.

Q. How did these two signs compare which were erected for the Denver Electrical Co.?

A. The first sign we erected for them was for an electrical show in the auditorium; after we got through with that we hung one over their door, their working place, their shop where they made the fixtures, and had us make a more elaborate one [142] later to go over their show-room.

Q. Were the two alike in construction and appearance?

A. One had a rim-letter; the first sign did not.

Q. By a rim, what do you mean?

A. A metal flaring border around the letter.

Q. Which one had the flaring metal border around the letter? A. The latter one.

(Deposition of Archibald Mackenzie.)

Q. That was erected, you say, approximately six months after the first one?

A. I say in June or July, along there, 1912.

Q. And concerning this "drugs" sign, erected in Littleton, was it erected before or after the second sign for the Denver Electrical Company was erected?

A. I think right after; they were erected close together, very close—well, to go back ten or twelve years and just tell exactly which was which, without a record of it, it is hard to do.

Q. What other signs did you construct and erect in Denver or vicinity during the years 1911 or 1912?

Mr. GRIFFIN.—The question is objected to unless it is shown that the signs in question relate to the subject matter of the patent in issue here.

Mr. LOFTUS.—Q. I will modify the question, then, to the extent of confining it to a sign of the type shown in photograph exhibit "M-2," having a flaring metal border around the outline of the letter, with a metal front and a glass placed behind this metal front and held in place in the plane of the sheet metal front.

A. One for the New York Floral Co., in July, 1912, and one for Mrs. DuBois in August, 1912.

Q. Can you give the address of those places, and state in what city or town?

A. The exact number I could not give you; I can give you the location. Mrs. DuBois' was on Broadway, between 8th and 9th. [143]

Q. In Denver?

(Deposition of Archibald Mackenzie.)

A. In Denver. The New York Floral Co. was on 16th Street, between California and Welton.

Mr. GRIFFIN.—Q. All in Denver?

A. All in Denver, yes.

Q. The New York Floral Company, where was that?

A. On 16th Street, between California and Welton.

Mr. LOFTUS.—Q. Were these two signs, viz., the Floral sign and the DuBois sign, projecting signs?

A. The New York Floral Co. sign was on top of the roof. It was a perpendicular sign, but on 16th Street they would not allow any sign to come out over two feet, therefore we had to set it back. The DuBois sign was a projecting sign, six feet out.

Q. What were the next signs of this type which you constructed and erected?

A. The May Company; it is the May Shoe and Clothing Company.

Q. When did you erect the first sign for the May Company? A. In November, 1912.

Mr. GRIFFIN.—I move that the answer of the witness be stricken out as it shows upon its face it was at a time subsequent to two years prior to the filing date of the patent that this testimony seeks to invalidate.

Mr. LOFTUS.—I wish to call opposing counsel's attention to the fact that any knowledge or use of a sign of this type prior to the filing of the Hotchner patent is sufficient to invalidate it, in the absence of

(Deposition of Archibald Mackenzie.)

any proof that Hotchner had completed his alleged invention prior to the date of the filing of his application, viz., October, 1914.

Q. Was this first sign for the May Company a projecting sign? A. No, it was an inside sign.

Q. How are you able to fix that date?

A. I got information on it before I left Denver as to the date that it was put up. [144]

Q. Do you mean that you looked up the records?

A. No, sir, I went to the assistant manager of the May Company and found out the dates. There was no other record of those. You did not need a permit to put a sign up inside of any building; there was no other record made only between the May Company and ourselves.

Q. This date which you give, November, 1912, was that the date when the sign was started or when it was completed?

A. That was the date we had a settlement after the completion, when paid for.

Mr. GRIFFIN.—I move that the answer of the witness to the previous question be stricken out, as it shows upon its face he is testifying not of his own knowledge, but upon hearsay.

The WITNESS.—I have a sworn affidavit here. (Producing paper.)

Mr. LOFTUS.—Q. Then do I understand that the first sign for the May Company was completed some time prior to November, 1912, when you received payment for it?

A. Yes, sir; finished and installed.

(Deposition of Archibald Mackenzie.)

Q. How long prior thereto?

A. It was practically at that time; there was not any lapse of time between the payment part and the completion of the sign.

Q. I show you a photograph, and call your attention particularly to the sign illustrated thereon, reading, "EXCELLO TROUSERS—FINEST ON EARTH," and ask if you can identify that sign?

A. I can.

Q. Please tell us what it is?

A. It is a sign installed in the May Company, on the second floor, the same style of sign we have made.

Q. Who installed that sign?

A. The Prismatic Sign Company.

Q. Which of these signs that you erected for the May Company is this?

A. That was the first sign we erected for them.
[145]

Q. Is that the one you stated was paid for in November, 1912? A. Yes, sir.

Mr. LOFTUS.—The photograph identified by the witness is marked Defendants' Exhibit "M-3" and offered and introduced in evidence as Defendants' Exhibit "M-3."

Mr. GRIFFIN.—The photograph is objected to as insufficiently proven; and upon the further ground that there is no showing as to the construction delineated, and the photograph being prior to two years prior to the filing date of the patent it seeks to invalidate; and upon the further ground

(Deposition of Archibald Mackenzie.)

there is no showing as to when the photograph was made.

Q. How does the sign shown in this photograph, Defendants' Exhibit "M-3," compare with the sign which you have previously described and sketched?

A. It is the same type of sign.

Q. Does it differ in any respect? A. No, sir.

Q. When was that photograph taken, if you know?

A. Right along at the same time; we followed them right up with pictures.

Q. Who took this picture (showing)?

A. A man named Dev. Regnier. [146]

Q. Taken under your instructions?

A. Yes, sir.

Q. Is the same true of the other photograph, Defendants' Exhibit "M-2"?

A. Yes, sir; all taken under our instructions.

Q. Following this sign shown in Defendants' Exhibit "M-3" what other signs of this type did you construct and erect?

Mr. GRIFFIN.—The question is objected to on the ground it refers to the signs installed less than two years prior to the filing date of the patent application in question.

A. We installed three more for the May Company then the next following year, 1913; that was December, I guess, along in December, 1912; just prior to 1913, along about Christmas time.

Q. Christmas time in 1912?

A. Yes, sir; Christmas, 1912.

(Deposition of Archibald Mackenzie.)

Q. What kind of signs were they?

A. "SILVER COLLARS." That was the Christmas of 1913; I should say that other one was 1912 that was installed; this was about a year later, 1913, Christmas; one said "HANNAN SHOES"; another "SILVER COLLARS"; we constructed those at one time; there were three of them right across the store.

Q. Those were all inside the store?

A. Those were all inside the store.

Mr. GRIFFIN.—Q. Those were all installed at Christmas of 1913? A. 1913.

Q. You mean to say all three of them were installed at Christmas of 1913?

A. The latter three I just mentioned, yes, sir; right along about that time; one in particular I know was constructed because, the reason I know it I bought some goods for Christmas presents when my wife was down in Los Angeles, so I am positive about the time that part of those—three—were installed; they were installed right along together there, the next three. [147]

Mr. LOFTUS.—Q. You state your wife was in Los Angeles the Christmas of 1913. Have you looked that up recently to verify it?

A. I have a card here (producing postal card) that my sister received from her at Los Angeles, with the date stamped on it, which shows when she was there.

Q. Is this the card you referred to (showing witness)? A. That is the card I refer to.

(Deposition of Archibald Mackenzie.)

Q. What is the date shown on it?

A. Just 1913 stamped; she did not have the date.

Q. That card was written by whom and received by whom?

A. By my wife on November 14th. Yes, it was 1913, received by my sister.

Q. I show you photograph illustrating a sign containing the words, "HANNAN SHOES FOR MEN—FOR WOMEN" and ask if you can identify the same. A. I can.

Q. What can you tell us about the sign shown there?

A. The signed was installed on the main floor of the May Company's Shoe Department.

Q. Is that the sign you referred to in one of your previous answers? A. It is.

Q. That was erected at what time?

A. The latter part of 1913.

Q. Who took this photograph?

A. Dev. Regnier, the same man who took the others, is my recollection.

Q. It was taken under your instructions?

A. Yes, sir.

Q. How soon after the sign was installed?

A. Very shortly.

Mr. LOFTUS.—Photograph identified by the witness is offered in evidence as Defendants' Exhibit "M-4."

Q. I show you another photograph illustrating a sign bearing the words "SILVER COLLARS 2

(Deposition of Archibald Mackenzie.)

FOR 25 CENTS” and ask if you can identify the sign shown there? A. I can.

Q. Is that one of your signs? A. It is.

Q. Erected for whom?

A. For the May Company.

Q. At what time?

A. Right along, in the latter part of [148] 1913.

Mr. LOFTUS.—Photograph identified by the witness offered and marked Defendants’ Exhibit “M-5.”

Mr. GRIFFIN.—Both exhibits “M-4” and “M-5” are objected to upon the ground that the witness testified that they were installed at a time less than two years prior to the filing date of the patent here in issue and sought to be invalidated; and upon the ground of insufficient identification.

Mr. LOFTUS.—What signs other than those you have already testified about, were constructed and erected by you in Denver, or elsewhere during the year 1913?

A. “Wm. Penn Hotel,” a metal sign hung underneath it by a man named Morgenson.

Q. I show you photograph illustrating the sign bearing the words “WM. PENN” in vertical position and the word “DRUGS” in a horizontal position beneath the same and ask if you can identify the sign shown thereon. A. I can.

Q. Is that the sign you have just mentioned as being erected in 1913? A. It is.

Q. Can you state approximately what part of the year either of those two signs were erected?

(Deposition of Archibald Mackenzie.)

A. The latter was erected along in December, 1913, and the other was erected just previously; they were hung close together; the signs were sold together; the "Wm. Penn" was first.

Mr. LOFTUS.—Photograph identified by the witness is offered in evidence and marked Defendants' Exhibit "M-6."

Mr. GRIFFIN.—The same objection is made to this photograph as was made to Defendants' Exhibits "M-4" and "M-5."

Mr. LOFTUS.—Q. Have you any record or papers tending to show when either of the signs illustrated in Defendants' Exhibit "M-6" was constructed and erected?

A. I have the contract.

Q. Will you please produce that contract?

A. (Producing [149] paper.) This is it.

Mr. GRIFFIN.—Any testimony with respect to this contract is objected to, upon the ground that it refers to a sign erected less than two years prior to the filing date of the patent application in question.

Q. Please read that contract into the record.

A. (Reading:)

ORIGINAL.

No. —.

Denver, Colo., Dec. 3, 1913.

To Mr. Morgensen.

We will make and put in place, ready to connect
— Prismatic Electric Sign as per sketch fur-

(Deposition of Archibald Mackenzie.)
nished, and approved by you for the sum of Fifty-five Dollars.

PRISMATIC SIGN CO.

By A. MACKENZIE.

Sign with
flasher
10-25 watt
lamps Gold
leaf rim.

The above proposition is accepted.

HENRY J. MORGENSEN.

20.00 cash \$10.00 each

30 days.

Paid in Full.

Mr. LOFTUS.—The contract produced by the witness is offered in evidence and marked Defendants' Exhibit "M-7."

Q. Which of the two signs shown in the photograph, Defendants' Exhibit "M-6," is referred to in the contract, Defendants' Exhibit "M-7."

A. The lower one, "DRUGS."

Q. Referring now to that contract when would you state that the "DRUGS" sign shown in the photograph, Defendants' Exhibit "M-6" was erected? A. In December, 1913.

Q. Is there any record of any payments made by the purchaser of this sign?

A. There is, on the back of the contract. [150]

Q. Please read those payments into the record.

A. (Reading:)

(Deposition of Archibald Mackenzie.)

Dec. 28th, 1913

Rec'd \$20.00

Feb. 16 10.00

Mch 13 10.00

April 9, 1914—\$10.00

Q. Who made these entries on the back of the contract? A. I did.

Q. At what time were they made, with reference to the receipt of payments; were they made at or about the same time?

A. The first payment was made about the same time, shortly after the installation of the sign.

Q. The question is, when were the entries made on the back of the contract?

A. At the time the payments were made.

Q. As I understood your previous answer, the first entry was made after the sign was erected?

A. Yes, sir.

Q. Do you recall any other signs of this type put up by you following the "WM. PENN" and "DRUGS" signs prior to October, 1914.

A. The "WEINBERGER" sign.

Q. What kind of a sign was that?

A. A vertical sign.

Q. Where was that installed?

A. On 15th Street, between Fremont and Court Place.

Q. In Denver? A. In Denver.

Q. Do you recall the date when it was installed?

A. January, 1914.

Q. Have you a photograph of that sign?

(Deposition of Archibald Mackenzie.)

A. I have.

Q. Please produce it. (Witness produces photograph.)

Mr. LOFTUS.—Photograph produced by the witness is offered in evidence as Defendants' Exhibit "M-8."

Q. Was that photograph taken under your instructions? A. It was.

Q. Does it correctly illustrate the sign which you installed for [151] "Weinberger"?

A. It does.

Mr. GRIFFIN.—The introduction of the photograph and the testimony with respect thereto is objected to, upon the ground that it was at a time less than two years prior to the filing date of the patent at issue here sought to be invalidated.

Q. Have you any record showing when that "WEINBERGER" sign was started or completed?

A. My contract.

Q. What does the contract show, or have you that contract with you? A. I have.

Q. What does it show?

A. January 17, 1914.

Q. Was that the date you made the contract?

A. Yes, sir; that is the date the contract was made.

Q. Does the contract show when the sign was completed? A. It does not.

Q. How soon after making of one of these contracts would the sign be completed?

A. It was to be up by February 1st; I think it

(Deposition of Archibald Mackenzie.)
was completed within the time limit.

Q. Was it usual for you to complete those signs within the time limit named in the contract?

A. It was.

Mr. LOFTUS.—The contract produced by the witness is offered in evidence as Defendants' Exhibit "M-9," and is offered in evidence as Defendants' Exhibit "M-9," and is as follows:

Defendants' Exhibit "M-9."

ORIGINAL.

No. —.

Denver, Colo., Jan. 17, 1914.

To M. Weinberger, 312-15 St.

We will make and put it in place, ready to connect, One Prismatic Electric Sign as per sketch *as per sketch* furnished, and approved by you for the sum of One Hundred Fourty dollars

To be paid 40.00 when hung
and the balance \$100.00 at
25.00 per Month. Said sign
to be up Feb. 1st.

THE PRISMATIC SIGN CO.

Per A. M. GRALL. [152]

Sign is to be 17 ft. long and 32" wide.

The above proposition is accepted.

Sign to be 14 inch letters without the apostrophe
S.

THE COURT PLACE LIQUOR CO.

M. WEINBERGER, Pres.

(Deposition of Archibald Mackenzie.)

(Endorsed:)

Feb. 17th

Cr by ck \$40.00

Mch 19th 25.00

Apr 20th 25.00

Mr. GRIFFIN.—The introduction of the contract is objected to as incompetent and immaterial; upon the further ground that it shows upon its face that it refers to a sign made at a time less than two years prior to the filing date of the patent in issue in this case.

Mr. LOFTUS.—Q. Do you recall any other electric signs of this type installed about the same time as the Weinberger sign?

A. One for the Empress Theatre.

Q. Have you a photograph of that sign?

A. I have.

(Producing photograph.)

Mr. GRIFFIN.—In Denver? A. In Denver.

Mr. LOFTUS.—Q. Referring now to the photograph which you have produced, what portion of the signs illustrated thereon were constructed and directed by you?

A. The signs known to the trade as V-shaped signs, the Prismatic.

Q. What is the reading matter on that sign?

A. "CONTINUOUS 11 A. M.—11 P. M. FIRST RUN PICTURES" and "VAUDEVILLE."

Q. When was that sign erected?

A. March, 1914; my recollection is that it was along near the same time, the first part of the opening, in the spring.

(Deposition of Archibald Mackenzie.)

Q. Was this photograph made under your instructions? A. It was. [153]

Q. Does it correctly illustrate the sign that is installed for this Empress Theatre? A. It does.

Mr. LOFTUS.—Photograph produced by the witness is offered in evidence as Defendants' Exhibit "M-10."

Mr. GRIFFIN.—This photograph is objected to upon the same ground as objection made to Defendants' Exhibit "M-4" and "M-5."

Q. Please produce that contract, Referring now to the contract that you have produced. What is shown thereby? What does it show?

A. It shows the Empress Theatre with a sign of the type mentioned.

Q. At what date? A. March 31, 1914.

Q. When was that sign completed?

A. I should say in thirty days.

Mr. LOFTUS.—Contract produced by witness is offered in evidence as Defendants' Exhibit "M-11."

Mr. GRIFFIN.—The offer is objected to as irrelevant, incompetent and immaterial; on the further ground that it refers to a sign erected within a period of less than two years prior to the application for the patent here in issue.

Mr. LOFTUS.—Q. The various photographs which you have identified and which have been offered here in evidence, do they correctly show the signs which you have installed and which you have testified about? A. They do.

Q. And are all those signs similar, or do they dif-

(Deposition of Archibald Mackenzie.)

fer in any respect as to construction?

A. The construction is the same in all of them, any more than some of them have a rim around their corners; a few with the rim off of them, but the general construction is the same.

Q. Did you ever construct a model of this type of letter? A. I did, several of them.

Q. Have you such a model available here, and which you can produce to show the type of letter which is used in these signs?

A. There is a model here; yes, sir. [154]

Mr. LOFTUS.—Please produce it.

(Witness produces model.)

Q. Referring to the model which you have just produced, by whom was that constructed, or under whose orders?

A. By the Prismatic Sign Co., of Denver.

Q. Approximately when was it constructed?

A. I believe during the year 1914; I could not positively say; we were making samples right along and fellows taking them out.

Q. What was the purpose and object in constructing this model or sample?

A. For salesmen to take with them to sell signs from.

Q. How did the construction shown in this model or sample compare with your commercial form of letter, such as shown in these various photographs?

A. The same thing; the same principle.

Mr. LOFTUS.—The model produced by the wit-

(Deposition of Archibald Mackenzie.)

ness is offered in evidence as Defendants' Exhibit "M-12."

Mr. GRIFFIN.—The offer of the model as an exhibit in question is objected to upon the ground that the witness has stated it was made in 1914, which shows upon its face that it was incompetent to anticipate any matter in the patent in issue in this cause.

Mr. LOFTUS.—Q. What can you say in regard to the sign for one Mrs. Ida Wright, Cadillac Hotel, 1731 California street?

Mr. GRIFFIN.—Objected to as leading. Let the witness tell of the signs he has made, and not have the names of signs suggested to him.

Mr. LOFTUS.—Q. Did you erect a sign for the person just mentioned? A. I did.

Q. When was that erected?

A. During the year 1912; I cannot give the exact month.

Q. Have you any records or papers bearing on this sign?

A. I have a letter from her in regard to what she thought of the sign—testimonial letter.

Mr. LOFTUS.—Please produce that letter.

(Witness produces the letter requested.) [155]

Mr. LOFTUS.—Please copy the letter into the records.

Mr. GRIFFIN.—I object to the copying of this letter into the record. It is an unsigned letter and improperly identified; dated at a time about six weeks prior to the filing of the patent in question,

(Deposition of Archibald Mackenzie.)

and insufficiently identifies any sign to which it refers, as to time or place.

(The letter is as follows:)

Denver, Colo., Sept. 9-14.

Prismatic Sign Co.,

Denver—

Gentlemen:

This is to certify that I have used one of your prismatic signs for more than a year and consider it the best sign for daylight and night service, and feel that it has brought me new business and consider it a good investment.

Mrs. IDA WRIGHT,

Cadillac Hotel,

1731 California St.

Q. Is that the original letter which you received from Mrs. Ida Wright. A. It is.

Q. When was that received?

A. I could not state positively about the date; there are too many dates to remember them.

Q. When was it received with reference to the date shown on the face of it.

A. It was received on the date shown there, September 9, 1914.

Q. Received by you?

A. Yes, sir; I went and asked for it.

Q. Where has it been kept since that time?

A. In the possession of the Prismatic Sign Co., among the records and things.

Q. Where have these various photographs which have been produced and contracts and other docu-

(Deposition of Archibald Mackenzie.)

ments which have been produced here, been kept?

A. In the possession of the Prismatic Sign Co.
[156]

Q. When were they removed from the files?

A. I brought them with me when I came here Monday at 1:30 o'clock.

Q. Of this week? A. Yes, sir.

Mr. LOFTUS.—Letter produced by the witness and which has been copied into the record is offered in evidence as Defendants' Exhibit "M-13."

Mr. GRIFFIN.—The letter is objected to; incompetent and immaterial, insufficiently identified; upon the further ground that it is not a signed letter and does not refer to a sign made at a particular time or place, nor to the kind of a sign.

Mr. LOFTUS.—Q. How did the sign which you erected for Mrs. Ida Wright compare with the other signs which you have testified about and which are shown in these various photographs and illustrated by the model exhibit "M-12"?

A. The same thing.

Q. Why did the Prismatic Sign Co. discontinue business?

A. On account of the high cost of materials, and material being hard to get, and on account of the competition we had with the City Utilities Commission and the Denver Gas & Electric Company.

Q. Can you name any other signs which you have not already mentioned, which were constructed and erected by you prior to October, 1914?

(Deposition of Archibald Mackenzie.)

A. We sent some to Butte, Montana, for the Val Blatz Brewing Company.

Q. Have you any records, documents or photographs bearing on the signs which you built for the Val Blatz Brewing Co.? A. I have.

Mr. LOFTUS.—Please produce them.

(Witness produces photographs and papers.)

Q. What is the nature of these records; describe them.

A. One is in the form of a contract, and another is a testimonial letter.

Q. Is there a photograph included there?

A. Yes, sir; a photograph. [157]

Q. Does this photograph correctly show one of the signs which you constructed for the Blatz Brewing Company? A. It does.

Q. Under whose instructions was this photograph taken? A. The Prismatic Sign Company.

Q. When and where was that sign erected?

A. Where was it erected?

Q. Yes, when and where.

A. It says "621 B Street," in Denver; I cannot tell you exactly the date; you are getting too many of them for me to try to remember; during 1914 though.

Q. What part of the year?

A. Along about July; it was summer, I believe, warm weather.

Mr. LOFTUS.—Photograph produced by the witness is offered in evidence as Defendants' Exhibit "M-14."

(Deposition of Archibald Mackenzie.)

Mr. GRIFFIN.—The photograph is objected to upon the ground of insufficient identification; upon the further ground that it refers to a sign constructed at a time less than two years prior to the filing date of the patent in question here.

Q. Referring now to the letter which you have produced, by whom was that received?

A. Received by the Prismatic Sign Co.

Q. At what date? A. August 15, 1914.

Q. Where has it been kept since that time?

A. It has been kept with the photographs that have just been produced in possession of the Prismatic Sign Co.

Mr. LOFTUS.—Letter produced by the witness is offered in evidence as Defendants' Exhibit "M-15."

Mr. GRIFFIN.—This letter is also objected to as purporting to be merely a copy, and is not a signed letter, and is insufficiently identified.

Q. What steps, if any, have you taken to verify or establish the dates when these various signs were constructed any erected by you, in Denver or vicinity? [158]

A. I have been in the office at the city hall for the permits, showing the date permits were taken out.

Q. Were you able to obtain certified copies of any of these permits?

A. I was, yes, sir, of the Denver Electrical Company.

Q. Have you that certified copy with you?

(Deposition of Archibald Mackenzie.)

A. I have.

Mr. LOFTUS.—Please produce it.

(Witness produces paper.)

Q. Which of the signs built by you for the Denver Electrical Company does this document refer to? A. The first one.

Q. Were you able to obtain any certified copy of the permit for the second sign? A. Yes, sir.

Q. Have you that with you?

A. There is one on the road. It should be here soon.

Q. When do you expect to receive that?

A. In the next day or two.

Q. Have you any photograph or illustration of a sign erected by you for the Denver Electric Company?

A. That should be here too; it has been sent; it should have been here; it should be here by this time.

Mr. LOFTUS.—Certified copy of the permit just produced by the witness is offered in evidence as Defendants' Exhibit "M-16."

Mr. GRIFFIN.—The offer is objected to as irrelevant, incompetent and immaterial; upon the further ground that it does not show the character of sign to which it refers; as to whether the sign was in any way in anticipation of anything in this action.

Mr. LOFTUS.—Q. Are you acquainted with Mr. C. E. Sprague?

A. I am.

(Deposition of Archibald Mackenzie.)

Q. In what way did you become acquainted with him?

A. Through working in co-operation with him. In the selling of signs in the city of Denver.

Q. What was the nature of Mr. Sprague's work?

A. He was with the Denver Gas & Electric Light Company, [159] the corporation that furnished the current for the signs.

Q. During what years did you know him in Denver?

A. About 1910 to 1915, I think; four or five years.

Q. Where is he now?

A. He is in San Francisco; I met him the other day here.

Mr. LOFTUS.—Notice is given on the record that Mr. C. E. Sprague will be called as a witness on behalf of the defendants in this case immediately following the conclusion of the present witness' testimony. There being no further direct examination at this time, it will be necessary to delay the completion of this witness' testimony until the photographs and certified copies of the permits mentioned by him have been received from Denver, Colorado. The counsel for plaintiff is advised that he may cross-examine at this time, with the understanding that the direct examination of the witness will be completed just as soon as the documents referred to have been received, the time and place of which will be duly communicated to him.

(Deposition of Archibald Mackenzie.)

Cross-examination by Mr. GRIFFIN.

Q. How did you come to go into the electric sign business?

A. We patented this Prismatic Sign; that is the way we went into the electric sign business. We had been in the sign business for years, in connection with our regular business.

Q. What was the number of the patent, do you know?

A. No, sir; I could not give you the number.

Q. In whose name was the patent taken out?

A. Archibald Mackenzie and T. M. Norton.

Q. What was the date of that patent?

A. The issuance?

Q. Yes.

A. I am all confused on dates. In 1910, I think it was January, 14th I could not tell you positively without referring to something to refresh my recollection; I have got [160] too many things mixed up, and that is one thing I ought to remember is the date of my patent, if anything.

Q. You are uncertain as to dates?

A. Yes, sir; I am; that is where there are so many of them together.

Q. Don't you know when this patent was applied for?

A. I think it was patented January 14, 1910.

Q. And that patent illustrates the construction of the Prismatic Signs, does it? A. It does.

Q. Have you a copy of that patent?

A. I have.

Q. Have you a copy with you?

(Deposition of Archibald Mackenzie.)

A. No, sir; I have not.

Q. Does that patent illustrate the construction of the first one of these signs that you have made?

A. Of the sample, yes, sir, the model.

Q. And does that patent illustrate the construction of the sign that you sent to Littleton, Colorado?

A. It does.

Mr. LOFTUS.—Q. Do you understand what is meant by the word “illustrate.”

Mr. GRIFFIN.—He does not need to have any question asked him. I object to any question being interjected by opposing counsel during the cross-examination of the witness.

Mr. LOFTUS.—Then I object to the questions directed along this line, unless the questions make clear what is intended by the word “illustrated.”

The WITNESS.—That would depend on what he means by “illustrate.” They were made according to the patent as near as we could make it.

Mr. GRIFFIN.—They were. Now you say that it was not until after 1912 that the Denver ordinances would allow you to put up one of those signs.

A. To extend out over the sidewalk; We could put them flat; next to the building; there was an ordinance that said that class of sign was to be classified as an electric sign and that if you put a sign out from a building, if it was an electric sign, it should be classified as being outlined by electric bulbs.

Q. You did not put up any of those signs then until after that ordinance was changed?

A. Yes, sir; put up one for the Denver [161]

(Deposition of Archibald Mackenzie.)

Electrical Company, flat faced to the building; one for the New York Floral Company, back on the lot there; we were not allowed to go out over the sidewalk.

Q. And the signs that you put up in 1911 were made in accordance with the construction outlined in the patent?

Mr. LOFTUS.—Same objection as previously made, on the ground that the question is indefinite.

A. They were made along the same lines; yes, sir; as near as we could make them, to conform with the construction mentioned in the patent.

A. To conform with the construction disclosed in the patent? A. Yes, sir.

Q. And of these signs made in 1912, they were made also to conform with the construction disclosed in your patent? A. Yes, sir.

Mr. GRIFFIN.—I would like to get a copy of this patent and I ask the witness if he can certainly place the date.

Q. Upon making an examination in the Annual Index of the Patent Office we ascertain the number 977665 on an illuminated sign, dated December 6th. Is that the patent to which you have just referred. (Exhibiting to witness.)

A. That is the patent.

Q. Showing you in the Official Gazette of the Patent Office the printed matter relating to patent 977665 on illuminated signs, found in volume 161 of the Official Gazette at page 84, I will ask you if that is the sign you have just referred to.

(Deposition of Archibald Mackenzie.)

Mr. LOFTUS.—Objected to for the reason that the Patent Office Gazette purports to show only a very limited portion of any drawing or description of the patent, it represents secondary, and not the best evidence, and thus any further cross-examination based on the impartial showing of the Patent Office Gazette would be improper, unless the complete copy is obtained, so that the witness may be able to identify the construction shown, in the patent and answer the question intelligibly. [162]

Q. Did you ever have any other patent than that one on the subject matter of electric signs?

A. There is one pending; it has never been finally allowed that I have heard of.

Q. Did you ever have any patent as early as 1914 on an electric sign, other than the one I have called your attention to?

A. I think we applied for one prior to that, an improvement on the same sign.

Q. Was the patent granted on the application?

A. No, sir; it never has up to date, that I have heard.

Q. But, in any event, that showing in the official Gazette illustrates the sign made by you in 1911 and 1912?

Mr. LOFTUS.—Objected to as irrelevant, incompetent and immaterial; for the further reason that the showing is incomplete, and is diminutive to the point of being incapable of understanding.

Mr. GRIFFIN.—Q. Do you understand the showing made in the illustration on page 84 of the

(Deposition of Archibald Mackenzie.)

Gazette, volume 161, relating to your patent?

A. Well, that is the official drawing that our patent was supposed to be based on.

Q. Do you understand it? A. I do.

Q. Do you think that it properly illustrates the invention disclosed in your application?

Mr. LOFTUS.—Objected to as calling for the conclusion of the witness; it being immaterial as to what this witness thinks as to the accuracy of the reproduction.

Mr. GRIFFIN.—Does that illustration properly represent the signs made by you and here testified about, in 1911 and 1912?

A. The working principles of it, yes, sir.

Q. Does that sketch fully illustrate the signs you have testified about as being made by you in 1911 and 1912?

Mr. LOFTUS.—Objected to, for the reason the alleged illustration on its face purports to be an abridgment. A. It does not. [163]

Q. You say the first sign made by you, such as you have testified about, was installed for the Denver Electrical Company in December, 1911?

A. Yes, sir.

Q. When did that sign reach the Denver Electrical Company, and where is that sign now?

A. I could not tell you.

Q. How long was it used?

A. It was used up to the date they took a double store on the corner for their show rooms, when this new sign was made, and that store was rented to an-

(Deposition of Archibald Mackenzie.)

other party, and the sign taken down; I don't know what became of the sign.

Q. And you have no photographs of that sign?

A. There are some on the road now; they should be here; there were orders left to have them taken.

Q. When were the photographs taken?

A. They are not taken yet; they were telegraphed for; they should be here now.

Q. Is that sign still in existence?

A. The one referred to, I could not say.

Q. The sign installed in December, 1911?

A. I could not say where that is.

Q. How could there be any photograph of it taken at the present time?

A. The second sign I referred to of the Denver Electrical Co.; there were two signs made for them.

Q. And the second sign made for the Denver Electrical Company was made sometime in 1913?

A. No, sir; it was made about six months after December, 1911—in the summer of 1912.

Q. Who was working for you at the time the signs were made?

A. The special sign for the Denver Electrical Co.?

Q. No, at the time, in 1911 and 1912.

A. Norton and myself made most of those signs at that time.

Q. You and Mr. Norton were the sole employees?

A. Yes, sir, at that time, when we first started in.

Q. Where is Mr. Norton now?

A. In Denver. [164]

(Deposition of Archibald Mackenzie.)

Q. What is his address, do you know?

A. It used to be 1835 West 25th Avenue, but he is in the next block now; the Denver address would catch him.

Q. What company is he with?

A. In business for himself, painting and decorating, the same business that I am in.

Q. And these signs that were erected at Littleton, Colorado, were they also made in accordance with the construction disclosed in your patent?

A. They were made according to our patent, but they had a little different style letter; the rim was put on those—that was not included in the patent, which made it a little more elaborate sign, a more effective sign, by rimming them that way.

Q. And what time of the year were those signs installed, did you say?

A. They were installed in the summer of 1912.

Q. How do you place that date?

A. Well, I know the Denver Electrical Company sign was made in 1911, and the Littleton signs were the next signs made after that; I remember it was in the summer months.

Q. Did they allow you to put up an interiorly lighted sign prior to 1912 at any place in Denver?

A. Put them up any time; no restrictions on interior lighting.

Q. What were the restrictions prior to 1912?

A. In order to be classified as an electric sign and get the privilege of going out six feet from the building and fifteen feet above the sidewalk—which

(Deposition of Archibald Mackenzie.)

was the ordinance for electric signs—every letter or device had to be outlined by electric bulbs. Ours did not have that, so it was not classified as an electric sign.

Q. But you were still allowed to hang one of those signs prior to that time, you say?

A. Only to conform with the ordinance.

Q. Would an interiorly lighted sign conform to the ordinance?

A. There was no ordinance on interior lighting; anything beyond the lot line was controlled by the ordinance. [165]

Q. No, I mean interiorly lighted signs, as distinguished from other signs?

A. That is what I say; they would not allow an interiorly lighted sign unless it was outlined by bulbs; that was the only kind of a sign that was classified as an electric sign. But I am speaking of interior signs, inside of a building; I have reference to those.

Q. Have you installed those inside of buildings?

A. I have, for the May Company, in 1912.

Q. And this sign for the May Company, when was that installed? A. 1912.

Q. You said in November, 1912; is that correct?

A. Whatever date I gave you at the time is correct.

Q. You have no definite recollection as to when the May Company sign was actually installed, and depend wholly upon your recollection—

A. (Interrupting.) I have an affidavit here—

(Deposition of Archibald Mackenzie.)

Q. (Continuing.) —or a record or some other matter obtained from the May Company?

A. I was putting out a good many signs; I cannot remember the exact date of every sign. I testified I put out 75 or 80, I thought; it is pretty hard to remember each date.

Q. Now, about this Neef Brothers Brewing sign, when did you say that was put out?

A. In the summer of 1912.

Q. How do you fix that date?

A. I know it was among the first signs that we built that could go out at all, that was out of Denver and we built that in 1912; that was the first year that we were allowed to put up any signs that would project over the sidewalk in Denver, and this went out a little; we could put it up there. I know it was prior to 1912.

(Thereupon, by consent, a recess was taken to two o'clock P. M., Wednesday, February 9th, 1921, at which time the parties being present as before, the cross-examination of the witness was [166] resumed.)

Mr. GRIFFIN.—Q. Have you talked with anyone concerning the testimony you are about to give?

A. I have, previously.

Q. During the intermission.

A. No, sir; first time they saw him.

Q. Have you talked with any other person about the testimony you are about to give?

A. I have talked the testimony over generally, in

(Deposition of Archibald Mackenzie.)

a general way; that is what I was brought out here for, to testify to my sign.

Q. Who brought you out here?

A. I was brought out by Mr. Thompson.

Q. The Federal Sign System paid your expenses?

A. Yes, sir; naturally; why should they not?

Q. And you were brought out for the sole purpose of giving testimony in this case?

A. Yes, sir.

Q. Are your other expenses paid?

A. Yes, sir, and my time.

Q. And your time?

A. Yes, sir. I am in business in Denver, and I cannot very well afford to give my time for nothing.

Q. Up to the first, we will say up to January 1st, 1912, how many signs had you made altogether, of any kind, electric signs?

A. Oh, roughly speaking, I should say in the neighborhood of about 25.

Q. Can you remember some of these signs, and where they were installed.

A. The two went to Littleton prior to June 1, 1912. The reason I can state that date is, the two in Littleton—

Q. (Interrupting.) I am not talking about 1912.

A. That is the question you asked.

Q. I say signs of any kind, prior to January 1, 1912.

A. That is what I say; there were signs made that went to Littleton prior to June, 1912.

(Deposition of Archibald Mackenzie.)

Q. I am not asking about June. You did not get my question.

A. I don't know how else I can answer it.

Q. Of signs made prior to January 1, 1912, of any kind, how many signs had your company made?

A. I know we had not made very [167] many prior to that time that the Denver Electric Company sign was made.

Q. You can't remember of any sign, other than the Denver Electrical Company sign, made by your company prior to January 1, 1912?

A. One for the Sanderson people, for coffee; that has not been introduced at all—"MOROVIT," I think.

Q. The Sanderson Coffee Company?

A. Yes, sir; W. S. Sanderson Brothers.

Q. Where was that installed?

A. On 15th Street, between Curtis and Arapahoe, in Denver, what is known as the tramway loop.

Q. And those are the only two signs that you can remember installing prior to January 1, 1912?

A. Those two went to Littleton, I am satisfied, prior to that.

Q. No, prior to January 1; not June.

A. I know, I understand what you mean. I say I am certain now of the Littleton signs. What refreshed me about that is that I got to thinking about the time I could put up the Denver sign, which was the 16th of June, 1912, and I know the Littleton signs went to Littleton before we were able to put up any in Denver at all; before we could

(Deposition of Archibald Mackenzie.)

hang any signs out any distance at all from the lot line in Denver; we placed those in Littleton.

Q. This "MOROVIT" coffee sign; where was that sign hung? That was not a sign of this character?

A. A sign of this character, but not extending from the lot line; it was in the doorway.

Q. It was not a sign with a raised rim?

A. Yes, it was. It was put inside of the lot line. We were not allowed to go out any distance from the lot line under the ordinance; they had that drafted after June, 1912.

Q. You said this morning you had never installed a sign of this character, except one in 1911.

A. I did not.

Q. You said the first sign for the Denver Electric Company did not have a raised rim letter.

A. That is correct; the [169] first one did not.

Q. The first one did not? A. No.

Q. That was the sign installed in December, 1911?

A. That was the first sign installed.

Q. And the other sign was installed about six months later?

A. Yes, sir, that is correct. This "MOROVIT" coffee sign was installed along about the same time, before this ordinance took effect that I spoke of, we were not allowed to go out beyond the lot line; at the time that was installed it was put in the doorway.

Q. That was after the first sign was installed?

(Deposition of Archibald Mackenzie.)

A. For the Denver Electrical Company, yes, sir.

Q. That must have been during 1912?

A. Yes, sir; I think it was, it was prior to June, 1912, because it was put up before that ordinance went into effect.

Q. But the Denver Electrical Company sign was the first one with a raised rim that you put up?

A. That is right.

Q. And the first sign that you put up for the Denver Electrical Company did not have a raised rim?

A. The first sign put up in Denver Electrical Company was without the raised rim; as I say, there was an ordinance in Denver under which we were not allowed to go out beyond the lot line; those Littleton signs were put up along about the same time that the Denver Electrical Company sign was put up.

Q. The Denver Electrical Company sign with a raised rim, you mean, about that time?

A. Yes, sir; the signs in Littleton were put up about the same time that was, too. The reason I know that is that we were at 1808 Arapahoe Street when the Denver signs were made, and the Littleton signs also, the first place I opened up in Denver.

Q. And you thought that was in July or August, you said this morning?

A. It was prior to June, 1912, I said I was positive about it, but I got to thinking about things and I remember now the folks had the mayor put

(Deposition of Archibald Mackenzie.)

through an ordinance [169] the first time by which we could put those signs up. Those Littleton signs were hung up prior to that, because we went to Littleton to put out signs to start with.

Q. You said this morning you had put up not over a dozen signs up to the beginning of 1912.

A. That is probably right.

Q. Then none of these signs were of the raised rim type?

A. Yes, they were; the signs in Littleton were both of the raised rim type. ?

Q. You just said you never had a sign in Littleton until the summer of 1912.

A. I said it was prior to June, 1912, because it was put up before we put up any signs in Denver. They were the first signs that we put up that extended out any place, and they were put up prior to June, 1912, because I had this ordinance changed, permitting the signs in Denver at Arnold's election, Henry J. Arnold's.

Q. The first sign that you remember of putting up with a raised border was the Denver Electrical Sign, you said this morning?

A. The first sign in Denver, yes, sir. ,

Q. And that sign was put up, you say, in June, 1912.

A. I said it was along about that time—no, I did not say the Denver Electrical Company; I said the signs at Littleton were put up prior to June, 1912.

Q. Then the Denver Electrical sign, with the raised border, was put up when?

(Deposition of Archibald Mackenzie.)

A. It would probably be in June, six months from December, 1912, or practically that.

Q. In July or August?

A. It was practically six months, as near as I can judge it; I have no way of fixing that exact date.

Q. But the first sign put up in December, in 1911, for the Denver Electrical Company did not have a raised border around the letters? A. No, sir.

Q. You said there were two signs that went to Littleton, Colorado; one of the signs reading: "DRUGS" and the other "BAR."

A. That is correct. [170]

Q. Are either one of these signs up at the present time? A. No, sir.

Q. When were they taken down?

A. When the state went dry, then the "BAR" sign was taken down. That would be, I think, in 1916.

Q. What about the "DRUGS" sign?

A. Well, the party quit business; I don't know what became of that sign.

Q. Who took the photograph that is marked Defendants' Exhibit "M-A-2"?

A. A man by the name of Dev. Regnier.

Q. Where is his place of business?

A. In Denver.

Q. Is he in Denver now?

A. He was the last I knew of him, yes sir.

Q. Do you know his address?

A. He is on Bennett Street, between Fifth and

(Deposition of Archibald Mackenzie.)

Sixth; I could not tell you the exact number.

Q. You can, at the present time, remember no other sign than the "DRUGS" sign shown in Defendants' Exhibit "M-A-2" with the raised moulding around the edge of the letter, put out by your company. A. That is the Littleton sign?

Q. The Littleton sign.

A. And the Denver Electrical Company sign, they were all put up along about the same time; the Denver Electrical Sign was first and these followed right along.

Q. Neither the Denver Electrical Company sign, with the raised border, the second sign put up by the Denver Electrical Company, nor the Littleton sign, are up at the present time?

A. The Denver Electrical Company sign is; it was up the day I left Denver, anyhow.

Q. Where is this second sign installed?

A. At the corner of 15th and Cleveland Place.

Q. At the corner of 15th Street and Cleveland Place in Denver? A. Yes, sir.

Q. Has it been up ever since it was installed in that location? A. Yes, sir.

Q. And you have no photographs of the first sign that was installed for the Denver Electrical Company, which is [171] referred to in the certified copy of the permit, "M-16"?

A. No, sir; I have no photograph of it.

Q. And that sign is not in existence at the present time? A. Not to my knowledge.

Q. Did you look at the records to see what was

(Deposition of Archibald Mackenzie.)

the date of installation of the second sign that was put up for the Denver Electrical Company? ,

A. It ought to be here, yes; I expect it here any day.

Q. Then of these signs erected by you prior to October 19, 1912, what ones, of the ones you have mentioned, had raised borders around the letters and were provided with lamps behind the body of the sign and glass for the illumination of the letter.

A. Prior to October?

Q. Prior to October 19, 1912.

A. The Denver Electric.

Q. One sign; that was the second sign.

A. Yes, sir; the second sign. The two signs at Littleton and the florists' sign, that is the New York Floral Company sign and the DeWitt sign.

Q. Where was the DeWitt sign erected?

A. On Broadway, between 8th and 9th. I am getting this confused with another one. The Du-Bois, I should have said. We made one for the DeWitt Hotel, but that was later.

Q. And you can remember of only five signs that were erected prior to October 19, 1912?

A. That "MOROVIT," I think, was; I am quite certain. You said "the ones referred to," and that was the question I was answering.

Q. I mean signs provided with a raised border around the letter.

A. That is all I can think of just now.

Q. And you had no employees during the time?

(Deposition of Archibald Mackenzie.)

A. Not during the making of those first signs;
No, sir.

Q. You did all of the work yourselves?

A. We did, my nephew and I.

Q. You and Mr. Norton? A. Yes, sir.

Q. Was there any other sign company in business at Denver at that [172] time?

A. Oh, yes, several.

Q. Name them.

A. The Curran Company, Ellis Eelectric Sign Company, The Denver Gas & Electric Company, handled signs of all kinds; they would sell them to anybody, and get somebody to make them.

Q. Any others?

A. I think the Cusack Company; I think so; I could not say positively; they succeeded Curran; I could not positively say whether they were building electric signs at that time, but they succeeded the Curran Company; I think they did. They are in the business now anyway,—Thomas Cusack Company.

Q. And is Mr. Norton engaged in the Electric sign business at the present time?

A. No, sir; in the painting and decorating business.

Q. Associated with you in any way?

A. Only as our copartnership held out in the sign business, that is all; not in any other business.

Q. At the present time he is not engaged with you in any way?

A. As a partner in the prismatic sign business.

(Deposition of Archibald Mackenzie.)

Q. Are you running the Prismatic Sign Company?

A. It is still in existence, yes, sir; it is not doing business a regular business, but they are still in existence.

Q. Is the Prismatic Sign Company a corporation or copartnership?

A. Just a copartnership.

Q. And Mr. Norton continues to be a copartner?

A. Yes, sir.

Q. And you never dissolved the partnership?

A. No.

Q. But you have not done any business as a copartnership since 1915?

A. Not since the war, whatever date that was.

Q. When the war began, you mean?

A. Since the war began, we have not practically done any sign business at all; the materials were just scarce, and we could not furnish light for the signs and we just lay down for a while.

Q. Do you expect to go into the sign business again? A. Some day probably. [173]

Q. Did any of the electric sign companies operating in Denver make any signs, of the character you testified about here? A. No, sir.

Q. During this period? A. No, sir.

Q. Where can Mr. Norton be found at the present time?

A. 25th and Elliott, would reach him; I can not tell you his exact address; he used to live at 2833

(Deposition of Archibald Mackenzie.)

West 25th Avenue; it is in the next block; his mother lives there; that address would reach him.

Q. You said this morning that you had installed about a dozen of these signs up to 1912; was that correct?

A. Well, those that I gave you I just made that estimate roughly, just offhand; I don't pretend to swear to the exact number.

Q. You don't know as a matter of fact, how many you did make, up to the first of January, 1912?

A. No, without I would stop and figure out, put them down as I went over them.

Q. At the present time you know of no other sign that was put up except the Denver Electrical sign, that did not have the border, prior to 1912?

A. Yes, I did; those at Littleton prior to June, 1912.

Q. I did not say June, 1912. I wish you would answer the question.

A. I am trying to answer it. You just asked me a question just now, prior to that date, prior to 1912, you said.

Q. I said prior to January 1, 1912, you do not know of any sign except the Denver Electrical Company's sign, which sign did not have the raised border around the letters, put up prior to January 1, 1912, by you?

A. That had been put up in June, 1912; the raised letter sign, that was about six months later, I would imagine; that is just an estimate, though, of the time. The first sign was installed in 1911

(Deposition of Archibald Mackenzie.)

for the Denver Electrical Company, and this was about six months later. [174]

Q. But you do not say that the first sign installed for the Denver Electric Company, had a raised border around the letters.

A. That first one did not.

Q. Referring now to this letter from Ida Wright, about the Cadillac Hotel, was the sign that that refers to put up shortly before the date of this letter?

A. That letter was gotten pretty nearly a year after the sign was put up.

Q. Then the sign was put up about September 9, 1913? A. About a year previously to that date.

Q. Who has kept the books and papers of the Prismatic Sign Company since you discontinued business?

A. I have part of the time and my nephew had these when I moved to the house that I moved out to and have at the present time. They have been in our possession all of the time.

Q. Have you any more of the books of the Prismatic Sign Company, showing the payments made upon any of the signs, in 1912?

A. Practically all of the signs I can think of, in 1912 I have mentioned here.

Q. But have you any of the books showing payments on any of the signs made in 1912?

A. Only have the contracts, as you see there, with credits on the back of them.

Q. You kept no books?

A. I did not keep a regular set of books, no, sir.

(Deposition of Archibald Mackenzie.)

Q. The only record that you have of the signs are the records that you have offered here?

A. That, with what you will find a record of in the City Hall; for every sign sold we had to take out a hanging permit; you can get the data there.

Q. But you have no other personal records?

A. Not at the present time.

Q. Did you keep records at that time?

A. Only the contracts.

Q. The sign that you call The Prismatic Sign was the sign that was constructed in accordance with the disclosure of your patent, [175] number 977665.

Mr. LOFTUS.—I object to the question as being indefinite for the reason it does not appear that the witness is versed in the interpretation of patents, and it does not appear that he clearly understands what is meant by the word or term “disclosures,” it being a technical term and one subject to various interpretations.

Mr. GRIFFIN.—You are familiar with the patent you obtained of the number I have just mentioned, are you not?

A. When I see it before me I probably would be, as far as the number is concerned. I am not versed on the patent law at all.

Q. As far as the subject matter and construction of the sign disclosed in that patent, you are familiar with that sign, are you not?

A. As far as the claims in the patent are concerned, we built the sign as nearly to the claims

(Deposition of Archibald Mackenzie.)

as we could make it, to cover the patent; the construction had nothing to do with it.

Q. You built your signs as nearly like the patent as possible?

A. As nearly like the claims mentioned in the patent as possible, yes sir.

Q. Didn't you make the sign like the drawings?

A. No, sir; I did not; the original drawings had a glass face; we made it of metal, with a cut-out letter and a bevelled rim on most of them.

Q. Do you know whether this druggist to whom you sold the sign in Littleton is in business now?

A. I could not say; the last I knew of him he moved his location from where he was and was running a kind of a little concession part out there and he went out of that I know. I could not say what became of him.

Q. He is not in the drug business at the present time? A. I could not say.

Q. You don't know his present location?

A. No, sir; I do not.

Q. How about the Neef Brothers Brewing Company?

A. They are out [176] of existence, that is as far as the company is concerned, I guess.

Q. Where are the owners of the company at the present time?

A. I suppose Mr. Neef is in Denver, but I could not say. The Brewers all quit business.

Q. The owners were named Neef?

A. Yes, Neef.

(Deposition of Archibald Mackenzie.)

Q. You have not their location in Denver?

A. No sir; I have not. Their old brewing plant was over on the west side; I could not tell you the exact address. "Neef Brothers Brewery" would reach them if they are still in business there.

Q. And this florist sign?

A. The New York Floral Company.

Q. Is that sign still in existence?

A. I don't think they are using that sign. The New York Floral Company is still in existence.

Q. And at the same place?

A. They are at the same address I gave you; it seems to me they are in the same block, but moved a little further up.

Q. How about this DuBois sign.

A. That is not in existence any more; that was a picture show out on Broadway; that disbanded business long ago.

Q. And you don't know where any body can be found who was connected with that establishment at the present time?

A. Not DuBoise, no.

Q. Was the translucent material in all of these signs similar to that used in the word "BLATZ"

A. Yes, sir.

Q. In exhibit "M-14"?

A. Yes, sir; that is the material we used in all of those signs.

Q. What was the character of those materials?

A. It was a ribbed glass.

Q. You have used wire mesh for the purpose of

(Deposition of Archibald Mackenzie.)

producing the translucent material at the back of sign letters, have you not? A. No, sir.

Q. You have never used it? A. Never used it.

Q. Are you working for yourself at the present time? A. Yes, sir. [177]

Q. Is Mr. Norton working for himself?

A. For himself, Yes, sir.

Q. And you are both independent of each other?

A. Yes, sir, independent contractors, that is in the business we are in at the present time.

Q. I mean in the business you are in at the present time? A. Yes, sir.

Q. This first sign that was made for the Denver Electrical Company was not the same as the model you have shown us here? A. No, sir.

Q. That was a sign made in December, 1911?

A. It was made the same in inward construction, but they did not have the rim letters.

Q. Now speaking about this floral sign, that was a roof sign, you said?

A. Vertical roof sign; yes, sir.

Q. Vertical roof sign? A. Yes, sir.

Q. How large was it?

A. I believe it was twelve feet high; I would not say positively; it was about twelve feet.

Q. And you made for the roof sign an interiorly lighted sign for the raised letters?

A. Yes, sir.

Q. How high on the roof was it placed on the street?

A. It was on the top of a one story building.

(Deposition of Archibald Mackenzie.)

Q. That was made for the New York Floral Company?

A. That was made for the New York Floral Company.

Redirect Examination by Mr. LOFTUS,

Q. You spoke about an ordinance passed in Denver permitting the erection of these interiorly lighted signs, and when they projected out on to the street. Do you know when that ordinance was passed?

A. Prior to June 1912, or right along about June 1912; I should say that was when the new officers took office that was the time the new ordinance was passed, shortly after the installation of the officers; right around about June or July, 1912.

Q. Did you have anything to do with the passage of this ordinance? [178]

A. I did.

Q. What part did you have?

A. I had to go before the Board of Aldermen and Supervisors and ask that a special ordinance be passed permitting my sign to be hung out.

Q. Who was the Mayor at that time?

A. Henry J. Arnold.

Q. When was he elected?

A. Elected in May, 1912, and took his office June 1, 1912.

Q. How soon after Mayor Arnold took office was this ordinance passed?

A. It was one of the first new ordinances passed inside of thirty days.

(Deposition of Archibald Mackenzie.)

Q. On cross-examination you were asked about your patent of 1910. Do you understand what was meant by the terms "illustrated in" or "disclosed by" that were used by the cross-examiner?

Mr. GRIFFIN.—I object to that question, as the questions were answered in the affirmative by the witness.

A. Well, I am not familiar with the patent terms as applied to a patent. I understood, as I say, that I manufactured signs as nearly as I could to correspond to the claims of the patent. I am not familiar with patent terms, or how you folks might place it. The sign was not built entirely according to the drawings.

Q. What differences were there between the signs which you built, those in Littleton and Denver, and the particular sign shown in the drawings of your patent?

A. The particular drawing was just from a model with a glass front; we were not allowed to put up glass front signs, so we had to change it to metal; we had a rim front, and cut the letter out of the rim; in order to get by the City ordinance, we had to change the front.

Q. Was there any raised moulding shown on the patent drawings? A. No, sir.

Q. How much notice did you have before making this trip to San Francisco?

A. I was notified of it about 5 o'clock Friday and I had to leave at 5 o'clock Saturday. [179]

Q. That was the first notice you had?

(Deposition of Archibald Mackenzie.)

A. Yes, sir.

Q. Referring now to the first sign which you put up for the Denver Electrical Company, you stated that it did not have a raised border. Were you building signs at that time with a raised border?

A. Had not done so at that time. The first one was used at the electric show in 1911; that was the first Denver Electrical sign.

Q. Did you submit to the Denver Electrical Company a plan for a sign with a raised border, when you first negotiated with them?

Mr. GRIFFIN.—I object to the question as not proper redirect examination.

Q. When you first negotiated with the Denver Electrical Company for the erection of a sign, did you submit to them a plan for a sign with a raised border?

A. On the second sign, yes, sir.

Q. Not in the first sign?

A. Not in the first sign. The first sign was used in the electric show, for a temporary sign and they finally moved it over to their shop and put it over the door. The first sign was for a display sign in the electric show.

Q. Have you a photograph of the sign reading "BAR" which was erected in Littleton, as you have testified? A. I have.

Q. Is this a photograph of it? (Exhibiting photograph to witness.) A. That is it.

Q. By whom was that photograph taken?

(Deposition of Archibald Mackenzie.)

A. By Dev. Regnier, the same man that took the others.

Q. Under your instructions? A. Yes, sir.

A. Does that correctly illustrate the sign that you erected at Littleton?

A. Yes, that is an exact duplicate of it.

Q. Is that sign in the background yours, reading "DRUGS?" A. It is.

Mr. LOFTUS.—Photograph identified by the witness is offered in evidence as Defendant's Exhibit "M-17." [180]

Q. You stated that the Prismatic Sign Company of Denver had not done any appreciable business since the war. You had reference to the time when the United States entered the war, or when some other country entered the war?

A. I had reference to the time the United States entered the war. The lighting companies were all shutting down on illuminating materials, they got so high that you could not get any profit out of your signs and we just quit business for the time being.

Q. You did not erect any signs, in Littleton, after the passing of this ordinance that you referred to, in Denver? A. In Littleton; no, sir.

Recross-examination by Mr. GRIFFIN.

Q. When did you see any one connected with this suit prior to your visit here?

A. I saw the Denver man, who just notified me they wanted me to come.

Q. When?

(Deposition of Archibald Mackenzie.)

A. That was on Thursday, I think, first.

Q. And had you communicated with any other person connected with the suit prior to that time?

A. I did not even know there was a suit pending until he told me he wanted some affidavits, and then they wanted me to come.

Q. You found this sign, the raised border around the edge of the elements of the letter a good selling proposition? did you? A. Yes, sir.

Q. You thought it entirely new? A. I did.

Q. Did you apply for a patent on it?

A. No, sir; I did not think I could get a patent on it.

Q. This ordinance that was passed in Denver in 1912, regarding interiorly lighted signs, what specifically did it provide?

A. That in order to be classified as an electric sign and get the privilege to go out 6 feet—which was the ordinance for electric signs—and fifteen feet above the sidewalk, the ordinance [181] read, every letter or device had to be outlined by electric bulbs, to be classified as an electric sign.

Q. That was prior to 1912?

A. Yes, sir.

Q. And that ordinance was passed in June?

A. Right after June, 1912, the new ordinance passed, permitting my signs to be hung.

Q. And no one concerned in this suit knew what you were going to testify to when you started for California? A. No, sir; not as far as I know.

(Deposition of Archibald Mackenzie.)

Re-redirect Examination by Mr. LOFTUS.

Q. Then, as I understand it, your sign, with the lights on the inside, was not classified as an electrical sign? A. Not at that time, no, sir.

Q. To be an electrical sign, the lights had to be on the outside?

A. That is the idea, the time previous to June, 1912 or shortly after that time, right after the ordinance was passed.

Mr. LOFTUS.—The witness is dismissed to be recalled for the purpose of identifying photographs and other documents which are now enroute from Denver.

Deposition of C. E. Sprague, for Defendants.

Thereupon the defendant called C. E. SPRAGUE as a witness, who testified, in answer to a question by Mr. LOFTUS, as follows:

My name is C. E. Sprague; age forty years; occupation salesman. I reside at 675 O'Farrell St., San Francisco, Cal. In 1910 I was with the Denver Gas & Electric Co. as salesman, looking after advertising illumination. I had a great deal to do with electric signs. I was familiar with the sign put up in Denver by the Prismatic Sign Company. The sign was an interiorly lighted sign, the letters being cut out of sheet metal and backed [182] up with translucent glass, or the space cut out was backed up to form the figure, the letter, with translucent glass; the rim edge about the letter had a flaring edge like the ordinary letter, ordinary size,

(Deposition of C. E. Sprague.)

was lighted with two Mazda lamps; the metal was generally of twenty-six gauge, galvanized sheet steel. The rim had a flaring edge. It was made of sheet metal soldered to the face of the sign. (Witness makes a rough sketch.) I intend this to represent the translucent glass, and will write the name of the part on it with the lead-line running to the part.

The sketch is offered in evidence as Defendant's Exhibit "M-18," "Sprague's sketch of prismatic sign."

Mr. GRIFFIN.—The sketch is objected to as insufficiently identified, incomplete, irrelevant and immaterial.

A. I first became acquainted with a sign of this type in the period covering two or three years prior to September, 1914. I left Denver November 29, 1914, and have not worked there since. I can name two hotel signs located on Felton Street between 15th and 16th; a sign on 15th Street, opposite the city courthouse; several interior signs at the May Co. on 16th Street.

Witness selects from several photographs and indicates Exhibits "M-3," "M-4," "M-5" and "M-8." I saw the exhibits "M-3" in the store of the May Company on 16th Street. The exhibit "M-4" was in the same store as was Exhibit "M-5." The sign shown in exhibit "M-8" was on 15th St., opposite the City Courthouse. I have been in the shop of the Prismatic Sign Co. on two or three occasions. I saw signs under construction there of the

(Deposition of C. E. Sprague.)

same type that I have described. I can only give the date in a general way; no specific date. It is prior to 1914, covering a period of two or three years.

Mr. GRIFFIN.—Move to have the answer of the witness stricken out, because it shows upon its face that he does not refer to a time two years prior to the filing of the application for the patent in issue here.

A. I know the ordinance of Denver regarding the hanging of signs [183] at that time. Double-faced signs extending over the street could not extend more than six feet from the building line. They necessarily had to be illuminated signs. Single-faced signs could be placed anywhere along the face of the building.

Q. Do you know how this type of sign shown in those photographs is classified?

A. At one time the city ordinances did not cover an interiorly illuminated sign. They required that the sign should be a lamp letter sign or bulb letter sign or exposed lamp letter sign. I do not know when the ordinance was changed.

Cross-examination by Mr. GRIFFIN.

Can you tell me any other signs than the ones you have indicated there as being put up in Denver of this type that you saw?

A. No, I do not remember any at all. The signs in the May Company and the sign opposite the courthouse were put up in about 1911, 1912 or 1913. I cannot place the date any nearer than those three

years. I am working for the Federal Electric Company as a sign salesman and have been so employed since September 16, 1919, and am selling electric signs at the present time. I regard the so-called Flexlume sign sold by the Federal Electric Company as a competitor. Any ordinary electric sign is a competitor of the Flexlume sign where it is interiorly lighted. As far as the dates go, I cannot place the dates of any of the signs that I saw in Denver within three years; not the specific dates.

Mr. TOWNSEND.—We will present to your Honor, under Rule 48, the affidavit of Tracy W. Simpson, which will largely cover the expert features. I will just briefly refer to some of the points. Mr. Simpson will be offered as a witness for cross-examination in addition to giving some fact testimony, just as soon as I have referred to this. [184]

Mr. GRIFFIN.—If your Honor please, it makes it exceedingly difficult for me to cross-examine this witness on a 14-page affidavit just submitted to me.

The COURT.—Does the rule prescribe when this shall be presented?

Mr. TOWNSEND.—It is, technically, at the time the case is at issue. The affidavit was only executed a few moments ago. Mr. Simpson has been carefully compiling it. Of course, I think as the witness reads it through, or as we read it through, you will probably observe that it is like expert affidavits—matters of opinion in regard to patents. The patents are in evidence. If counsel will run

through the affidavit he will quickly see on what points he wants to cross-examine.

Mr. GRIFFIN.—It is not to the affidavit, itself, that I make any objection, but it is to the impossibility of making any adequate cross-examination on a fourteen-page affidavit first submitted to me when the cross-examination is to take place.

The COURT.—Have you any other oral testimony?

Mr. TOWNSEND.—One witness.

Mr. GRIFFIN.—We might go on with the case, and let the cross-examination be had tomorrow morning.

The COURT.—We will complete the case this afternoon, will we?

Mr. GRIFFIN.—As far as we can, your Honor, and then have the cross-examination to-morrow morning.

The COURT.—We will complete it this afternoon, even if we have to examine him orally.

The TOWNSEND.—I will touch the main points in the affidavit.

Mr. Simpson, having qualified both by educational qualifications and from technical experience in engineering, and as the president of the Federal Sign System, he has been with this company since [185] early in 1914 and is familiar with its doings. He analyzes the first Hotchner patent in suit, represented by the drawing. The front of the metal sign is struck out to form a border, and at the same time to form a pocket for the glass to rest in and lie in

the plane of the front. There are two forms, as he points out and refers to as Points 1 and 2. He quotes from the patent to the effect, "The letter construction is the important feature of the present case." He says that pressing, and stamping, and forming in the mechanical arts have a very definite meaning. Pressing is usually done, and it means stamping or drawing in a flat bed machine in which the metal is stretched into various shapes. Then he describes stamping. Then he says that there is a misdescription in the patent. He makes this quotation:

"The sheet of translucent material is not cut out the shape of the letter but covers the entire area defined by the length and breadth of the letter or character. By thus making the sheet of translucent material cover the entire outer area of the character without conforming to the outline of the letter, the cost of manufacture is reduced while the structure is actually stronger." Here are two specimen letters, one in accordance with figures 1 and 2 of the patent, and one in accordance with figures 3 and 4 of the patent. Your Honor will see that the letter is cut out to outline and does not cover the entire back.

The COURT.—These are the Hotchner letters?

Mr. TOWNSEND.—Yes, sir.

The COURT.—Where is the one that it is claimed infringes?

Mr. TOWNSEND.—This is the Federal's device, and I suppose that is one they call an infringement.

You will notice by looking at the back of this—you will see certain physical differences as you look at them from the front.

The COURT.—What is it the plaintiff claims under his patent—the exclusive right to use this?

Mr. TOWNSEND.—Apparently, from the *prima facie* case, they [186] claim any sort of a beveled border as an infringement.

Mr. GRIFFIN.—We claim the right to use any kind of a raised metal molding.

The COURT.—And you claim no one else has a right to use it.

Mr. GRIFFIN.—We claim no one else has the right to use the metal molding in connection with this translucent letter with the illumination in the back of the character.

Mr. TOWNSEND.—The claims do not give them any such protection at all. There was nothing that would entitle such a claim to a patent at the time Mr. Hotchner came into the field.

Now, if your Honor will just turn over the samples and look at the back, you will notice the Federal sign is one piece of glass. If you look at the two samples, you will see that they are cut out in the shape of the letter. That cut-out fashion is the only way you can put the plaintiff's glass letter into a sign and have it conform to his specifications and descriptions. When *we* has described in his specifications that he can use a piece of glass of the maximum breadth and length of the letter—

The COURT.—It seems to me you are going

much further than is necessary and much deeper into the question, in view of the claim made by the plaintiff, that he has the exclusive right to use anything of this kind.

Mr. TOWNSEND.—Yes, I think so, your Honor.

Mr. GRIFFIN.—The claim is not limited to the construction of the glass back, as counsel on the other side has referred to it. It is true that the specification does say something about making the glass back in a certain way, but the claim is not so limited as that.

Mr. TOWNSEND.—Your Honor knows that a claim must be read in connection with the disclosures in the specifications and drawings. The only reason we are going into this this way is to show your Honor exactly what the true facts were. Mr. Simpson goes on to show, your Honor, that except where you have a block letter, like “I,” with no re-entering portions, like the [187] letters “H,” or “C,” or any tie portions, like other letters, that the only way you can make the plaintiff’s patented sign is to cut out his letter to shape the material, the metal material. You can see that counsel’s claim of a raised metal border, being within his patent, brings him immediately within the prior art.

The COURT.—That is the principal question in the case, whether, at this day and age, a man can maintain an exclusive right to use a thing of that kind by a patent.

Mr. TOWNSEND.—He cannot. What Mr. Hotchner has done at the very best, and we want to

give him all he is entitled to, his patent would be for this specific method, of bending it out there and getting—

The COURT.—That proposition is not involved in this case.

Mr. TOWNSEND.—No. We do not do it, and never have. We can very quickly pass over the first patent.

Now, coming to the second patent, he calls attention to the fact that municipalities, as a rule, require—

The COURT.—Have you anything more to illustrate the difference between the two?

Mr. TOWNSEND.—Yes, your Honor. This large one is the defendant's structure, and the smaller one is made according to the second Hotchner patent. This second Hotchner model brings the bottom reflector up into the body of the box, so that a considerable portion of it projects upwardly above the lower portion of the glass sign. So, naturally, a light put in there shining down, will have its rays reflected horizontally out through the glass. Then there is this trough underneath.

The COURT.—That is the portion that he claims is infringed.

Mr. TOWNSEND.—That is the part that he claims is infringed. The first claim has a wording by which the light in the bottom, here, the means by which you do not see that light as you approach it horizontally, that means is the metal part of the shield, itself. [188]

The COURT.—Isn't it the bottom part that it is claimed is infringed, and not the upper part?

Mr. TOWNSEND.—There is an alleged combination, your Honor, but it is nothing but a pure aggregation. It is just as though you had a light up on top of the building, and cast the light into a room, and at the bottom part a light casting its rays down to the sidewalk. It is a combination, they claim.

The COURT.—Two separate lights.

Mr. TOWNSEND.—Two separate lights, with no co-action.

The COURT.—What I want to know is just what the plaintiff claims.

Mr. GRIFFIN.—There is a co-operation between that upper reflector—

The COURT.—The light that reflects on the street comes entirely from the bottom light.

Mr. TOWNSEND.—Yes, your Honor. Now, in order to work out a so-called combination, by bringing this reflector upward from the bottom—

The COURT.—You have not that combination at all.

Mr. TOWNSEND.—We have not. We have only the ordinary function of an underneath light casting on the sidewalk. The box or trough that shields that projects only a short distance up into the box, and not up into the glass letter, at all. There is no reflected action within the box at all. So you have not that sort of a combination, or aggregation, or whatever you want to call it.

That represents the physical differences. It is

pointed out by Mr. Simpson in his affidavit, and he will identify these models when he takes the stand; he points out that it was common in certain municipalities, for instance, Seattle has an ordinance which was enacted as early as August 8, 1909, in which it was required that electric signs made entirely of galvanized iron letters formed on each side of the sign, of a certain size, illuminated from the inside, with not less than 200 candlepower [189] to each sign, and more if the size of the sign shall require, with the bottom of the sign left open to illuminate the sidewalk, will be allowed to be constructed as provided. He refers then to other patents, and analyzes those and shows their application.

Now, as Mr. Simpson takes the stand, he will identify the —

Deposition of Tracy W. Simpson, for Defendant.

Defendant thereupon called TRACY W. SIMPSON, who testified as follows:

My name is Tracy W. Simpson. My age is 35 years. I am a resident of Berkeley, and at the present time vice-president and Western District Manager of the Federal Electric Company, a California corporation. I have been with the Federal Electric Co. since August, 1914.

Q. Will you please describe briefly some of the types of electric signs which your company manufactures?

Mr. GRIFFIN.—I object to this question unless

(Deposition of Tracy W. Simpson.)

it is shown that this particular question has to do with some issue here.

The COURT.—I presume it has.

Mr. LOFTUS.—That is only preliminary to laying a foundation.

The COURT.—I think the question is too broad; that might include a lot of things that have nothing to do with this case.

Mr. LOFTUS.—Q. Does your company make interior-lighted signs?

A. Yes, sir.

Q. Will you describe the construction of those, briefly?

The COURT.—Are these the ones you have here?

Mr. LOFTUS.—Some of them.

A. The earliest form of interior-lighted sign that was constructed comprised a box-like structure with lights on the inside, the front portion of the box cut out into the shape of the character, and that front portion backed up by some translucent material. Then, as the desire for embellishment became evident, we made additions to that plain, simple, transparent [190] cut-out sign. Those embellishments consisted of various things attached to the face of the sign. There would be strips of molding on the top edge of the sign, or the lower edge of the sign, or around the letter. Furthermore, due to the desire to confine the light in order to make certain that the light would follow a direction approximately horizontal to the sidewalk, we adopted the practice

(Deposition of Tracy W. Simpson.)

of placing channels around the letter. Those channels—

Mr. GRIFFIN.—If your Honor please, I object to all this answer and move that it be stricken out as not responsive to any issue in this case. This patent application was filed more than seven years ago, and is a very old application. It is very material in this case that whatever is testified to here be at a fixed time, that is, the time before that application was made.

The COURT.—I think that is correct.

Mr. LOFTUS.—This is just to show the origin and development of the construction, your Honor. Just proceed very briefly, Mr. Simpson.

A. (Continuing.) This little bit of history is taken, really, from the records of the company, and dates back a great many years, and does not in any way apply to me in personal experience, although I have, in my present experience, gone through all of the evolution which I have just described. So the idea of placing a small channel around such transparent letter was nothing more or less than a forerunner of these various embellishing borders. Then with certain types of letters it became desirable to place this channel or troughing around the letter in an easy and simple way, so we conceived the idea of bending them up out of lead, lead being a ductile metal and easily bent by the workmen, and it was very economical to place those channels or borders around the edges of the letter. That lead was manufactured in the same way that lead pipe

(Deposition of Tracy W. Simpson.)

is manufactured, by a process known in the mechanical arts as extruding. The lead [191] which I have just described was used by us in the manufacture of the Normal Pharmacy sign which is complained of—

Mr. GRIFFIN.—I have another objection, the witness stated that much that he was testifying to he had no personal knowledge of; that is an additional reason for striking out his answer. He has testified that he had no personal knowledge of the history that he was talking of.

Mr. TOWNSEND.—I think your statement is too broad.

The COURT.—If you are correct in that, the testimony is incompetent. I didn't so understand the witness, though.

Q. Are you testifying from company records, or of your own knowledge?

A. In my position I have access to the company records for a great many years back.

Q. Are you testifying from company records, or from your own knowledge?

A. I am testifying as to both.

The COURT.—You cannot testify from the records.

A. (Continuing.) I have been with the company since 1914, but previous to that time I lived in Chicago and was quite familiar with the work the company was doing, because I was in an interrelated line.

(Deposition of Tracy W. Simpson.)

The COURT.—Confine yourself to matters within your own knowledge.

Mr. GRIFFIN.—There is an additional reason why this should be stricken out. He has testified that he was with this company since 1914, and all of this relates to matter prior to 1914.

Mr. TOWNSEND.—Just let him explain the matter, and he will cover it all.

Mr. LOFTUS.—Q. You testified that your company manufactured an interior-lighted sign, with a plane face, that is, one without a molding; have you a sample or model of such a letter here, and if so, produce it? A. Yes.

Q. Is this the letter you refer to? A. Yes.

Mr. LOFTUS.—I offer it in evidence. [192]

The COURT.—Q. When was this manufactured?

A. This was manufactured recently, it is just merely a sample.

Q. When did your company use that kind of a letter?

A. Ever since I have been with it, and, to my personal knowledge, I have seen products of this company as long ago as 1909.

The COURT.—It will be admitted.

Mr. LOFTUS.—I think counsel will not make any contention that this is an infringement.

The COURT.—It is entirely too late now to get a patent on the alphabet.

Mr. GRIFFIN.—I object to this exhibit, and to any answer as not bearing on any issue in this case.

(Deposition of Tracy W. Simpson.)

We are not concerned with any flat letters of this character.

Mr. LOFTUS.—We are using this merely to show the development of this matter.

The COURT.—I think he has sufficiently developed it. The use of letters for advertising purposes is older than I am.

Mr. TOWNSEND.—Mr. Griffin, would you contend that this Exhibit “T” just referred to by witness infringes either of the patents in suit?

Mr. GRIFFIN.—I say it does not. I say it has no bearing on any issue in this case.

Mr. TOWNSEND.—That is all right.

(The model was here marked Defendant’s Exhibit “T.”)

Mr. LOFTUS.—Q. You also mention the use of a channel. Can you illustrate to the Court the manner in which such a channel is applied to a letter of this type?

A. We produced channels or strips of metal separately constructed of sheet steel or other similar material, and bent it in the form of a right angle, somewhat as appearing on the sample in my hand, and placed it around the periphery or perimeter of this letter, in order to create a trough or a channel completely surrounding the letter. [193]

Q. You also mentioned the use of lead to decorate the border; can you illustrate the manner in which you applied that? A. Yes—

Mr. GRIFFIN.—I object to any question upon this particular subject matter, unless it is shown at

(Deposition of Tracy W. Simpson.)

what time this particular material was used. It is essential to this case that it be proven and the only thing that is essential here is that it be proven that the matters spoken of and proven be at a time prior to two years before the filing date of each of these two patents. We have no dates given whatever, and no time fixed, and no idea as to when this was done.

Mr. LOFTUS.—This is merely offered to illustrate the manner in which these letters were made. We will come to the subject of the prior part in a minute, and we will prove plenty of instances long prior to the Hotchner patent.

The COURT.—Whether you use lead, or wood, or iron, or anything else, is not a matter of invention, it is merely a matter of choice. I don't see the necessity of going into it, myself, but you can make up your own record.

Mr. TOWNSEND.—This lead border he is speaking about is the thing they are complaining about, and I am surprised that counsel does not know when we used lead.

The COURT.—This testimony is only competent if it was anterior to the application by the patentee.

Mr. TOWNSEND.—It is competent to show the practice of the defendant, and the only practice the defendant has ever had.

Mr. LOFTUS.—In any patent case, there must be identity of function to show infringement, and the witness is explaining the function of this border.

A. (Continuing.) I am trying to show how the

(Deposition of Tracy W. Simpson.)

sign which is complained of by the plaintiff was made.

The COURT.—Q. When was it made?

A. It was made about a [194] year ago. It is the sign complained of and upon which we are being sued.

The COURT.—That is admitted here.

Mr. LOFTUS.—Yes, but it does not show the manner of constructing it.

The COURT.—I don't understand that the manner of constructing it is at all material. If you put a piece of an old bootleg around here it would infringe the patent, according to the plaintiff's theory.

Mr. GRIFFIN.—That is not the idea, at all.

The COURT.—What is your idea?

Mr. GRIFFIN.—I am standing on claim 4 as it reads.

The COURT.—I will allow the testimony to go in subject to objection. Proceed.

A. (Continuing.) The lead border, a sample of which I have in my hand, was placed around the periphery of the letter and soldered in place.

Mr. LOFTUS.—Q. This lead that you have just referred to, is this the stock which you use to construct signs having the outline molding at the present time?

A. Yes, that is taken right from our stock-room.

Mr. LOFTUS.—I offer those two strips of lead in evidence, and ask that they be marked Defendant's Exhibit "U."

The COURT.—Admitted.

(Deposition of Tracy W. Simpson.)

(The objects were here marked Defendant's Exhibit "U.")

Mr. LOFTUS.—Q. Have you any models showing the manner in which the lead border and glass is assembled in defendant's construction, and, if so, produce it.

A. Yes.

Q. That correctly illustrates the defendant's construction? A. Yes.

Mr. LOFTUS.—We offer that model in evidence.

Q. Who made it?

A. It was made by several of the men in our [195] shop, under my personal supervision and direction.

Mr. LOFTUS.—We ask that it be marked Defendant's Exhibit "V." (The model was here marked Defendant's Exhibit "V.")

Q. Have you a specimen of letters such as defendant constructs, using lead molding, and if so, produce it. A. Yes.

Q. It is this letter "H"? A. Yes.

Q. Who constructed that?

A. That was constructed by various men in our shop, under my personal supervision.

Q. Does this correctly indicate defendant's construction, such as was used in the Normal Pharmacy sign?

A. It does, with the exception that the sample illustrates a plain block letter, whereas the sign was of a script letter.

(Deposition of Tracy W. Simpson.)

Mr. LOFTUS.—The sample identified by the witness is offered in evidence as Exhibit “W.”

The COURT.—These other two are admitted to be correct samples of plaintiff’s construction?

Mr. GRIFFIN.—Yes, substantially.

The COURT.—And these two are substantially your construction?

Mr. GRIFFIN.—That is one construction; however, it is not the construction we use. This back part—

The COURT.—The back part is not material.

Mr. GRIFFIN.—The back part is not material.

Mr. TOWNSEND.—The construction they use is not according to the patent, your Honor, so it is not material what they do use.

Mr. LOFTUS.—Do you stipulate that these correctly represent the construction shown in the Hotchner 1918 patent, Mr. Griffin?

Mr. GRIFFIN.—They correctly represent some of the construction shown, yes, but they do not represent all of the construction possible under the claims of the patent.

The COURT.—The face of it is correct?

Mr. GRIFFIN.—No, the face is not correct, because the face [196] of it shows separate pieces of glass.

The COURT.—Whether it be one piece or many pieces would not be a matter of invention.

Mr. GRIFFIN.—No, your Honor, but I am asked to stipulate something which I do not care to stipulate.

(Deposition of Tracy W. Simpson.)

The COURT.—The only question in my mind is whether the raised form of letters is the same as you claim the right to make under the first patent.

Mr. GRIFFIN.—Yes, your Honor, the front appearance of those two is substantially the same as the front appearance of the letters made in accordance with the disclosure of the patent.

Mr. LOFTUS.—I will have to interrogate the witness on that if Mr. Griffin contends that those backs can be put in in any other way. I want to show that they cannot be.

The COURT.—I don't understand that the back is involved here at all. I may be in error.

Mr. LOFTUS.—It is the necessary construction in order to get the glass into that pocket.

Mr. GRIFFIN.—That is not the fact.

Mr. TOWNSEND.—That is covered, your Honor, by the expert's affidavit.

Mr. GRIFFIN.—The patent speaks for itself.

The COURT.—I am not an expert on patents, but it seems to me we are getting away beyond the actual point in controversy in this case.

Mr. LOFTUS.—Q. Have you read, and do you understand the construction shown in the Hotchner patent of March 12, 1918, here in suit? A. Yes.

Q. Have you made a model of any or all of the forms shown and described therein?

A. Yes, I have made a model of both forms.

Q. I hand you a model here which is labeled Hotchner patent [197] 1259237, Figures 1 and 2, and ask you if you are familiar with it?

(Deposition of Tracy W. Simpson.)

A. Yes, sir.

Q. And you made that model?

A. It was made by various men in our shop under my supervision.

Q. Does that correctly represent any one of the constructions shown in the Hotchner patent referred to?

A. It represents the construction illustrated in Figures 1 and 2.

Mr. LOFTUS.—I offer that sample letter in evidence.

The COURT.—Admitted.

(The sample letter was here marked Defendant's Exhibit "X.")

Mr. LOFTUS.—Q. I hand you another sample, labeled "Hotchner patent 1259237, Figures 3 and 4," and ask you if you are familiar with the same?

A. Yes, I am familiar with it.

Q. And you made that model from the sample?

A. It was made by various men in our shop, under my supervision.

Q. Does that represent any of the construction shown in the Hotchner patent referred to?

A. Yes; figures 3 and 4 of the Hotchner patent of 1918 illustrate a block letter "I," built in a peculiar way, in which there is an extra position—or, I would say depression surrounding the outline of the letter. This is the letter "H" produced in the same manner as the letter "I" illustrated in the patent Figures 3 and 4.

Mr. LOFTUS.—I offer this sample in evidence.

(Deposition of Tracy W. Simpson.)

The COURT.—Admitted.

(The sample was here marked Defendant's Exhibit "Y.")

Mr. LOFTUS.—Q. Have you any detail model showing the construction of the Hotchner patent 1259237? A. Yes, sir.

Q. I hand you a detailed model marked "Hotchner patent 1259237," Figures 1 and 2, and ask you if you are familiar with it?

A. Yes, I am familiar with this.

Q. By whom was that made?

A. It was made in our shop by various men, under my supervision.

Q. Does that represent any of the structures shown in the Hotchner [198] patent referred to?

A. Yes, it represents an enlarged detail or piece of a corner of the border made of metal somewhat thicker than we would ordinarily use in practice, in order to illustrate the relative disposition of the component parts.

Mr. LOFTUS.—I offer that model in evidence.

The COURT.—Admitted.

(The model was here marked Defendant's Exhibit "Z.")

Mr. LOFTUS.—Q. I hand you another detailed model labeled, "Detail, Hotchner patent 1259237, figures 3 and 4," and ask you if you are familiar with it? A. Yes, I am familiar with this.

Q. Does that represent any of the structures shown in the Hotchner patent? A. Yes, sir.

Q. Which form?

(Deposition of Tracy W. Simpson.)

A. It represents an enlarged detail of the particular construction illustrated in figures 3 and 4 of Hotchner's patent, the detail applying only to the border.

Mr. LOFTUS.—I offer the model in evidence.

The COURT.—Admitted.

(The model was here marked Defendant's Exhibit "AA.")

Mr. LOFTUS.—Q. Have you read and do you understand the structures shown and described in United States patent 32195, to Little, referred to in your affidavit which has been offered here in evidence? A. Yes, sir.

Q. Have you a model of that construction?

A. Yes, sir.

The COURT.—What is the date of that patent?

Mr. LOFTUS.—That was 1861, your Honor; a copy of that patent is here in evidence.

Q. I hand you a model bearing the legend, "Little patent, 32195," and ask you if you are familiar with that model? A. Yes, it was made in our shop.

Q. Under whose supervision? A. Mine.

Q. Does it correctly represent the structure shown in the Little patent?

A. Yes, with the exception that we have placed on the back of the wooden background of the model a little sheet [199] metal in order that the model may be placed in a frame similar to the other models which were made at the same time. That explains the little sharp edge which does not show in the Little sign.

(Deposition of Tracy W. Simpson.)

Q. Does that piece of metal that you just referred to change or alter the alteration of that construction? A. No, sir, in no way whatever.

Mr. LOFTUS.—I offer that in evidence.

The COURT.—Admitted.

(The model was here marked Defendants' Exhibit "BB.")

Mr. LOFTUS.—Q. Have you read and do you understand the French patent to Boldes, 335943, referred to in your affidavit?

A. Yes, I read it and understand it; I have read a translation of it.

Q. Have you made a model of the structure shown and described in that patent? A. Yes, sir.

Q. I hand you a model so labeled, and ask you if you are familiar with the same.

A. This is the model we made, and I am familiar with it.

Q. Does that correctly represent the construction shown and described in the French patent referred to?

A. Yes, sir. There are several alternative constructions which may be derived from an inspection of the French patent; the border, which, for convenience, I have placed here in the form of a wooden border, may be metal. The background, which I have made opaque by painting very thick paint over a glass surface blackground, according to the patent, may be made opaque by any other suitable means, such as by placing metal over it, or tinfoil, or something of that sort.

(Deposition of Tracy W. Simpson.)

Mr. LOFTUS.—I offer the model in evidence.

The COURT.—Admitted.

(The model was here marked Defendants Exhibit "CC.") [200]

Mr. LOFTUS.—Q. Have you read and do you understand the construction shown and described in the Hotchner patent 769139 of August, 1904?

A. Yes, I am familiar with it.

Q. Have you made a model of any of the structures shown and described in that patent?

A. I have.

Q. I hand you a model, and ask you if you are familiar with the same?

A. I am familiar with it; it was made under my supervision in our shop.

Q. Does that correctly illustrate any of the structures shown in the said Hotchner patent of 1904?

A. Yes, it represents one of the constructions.

Q. Which one?

A. The construction illustrated in Figure 7.

Mr. LOFTUS.—I offer the model in evidence.

The COURT.—Admitted.

(The model was here marked Defendants' Exhibit "DD.")

The COURT.—Wherein does that differ from the structure of 1918?

Mr. LOFTUS.—That is what we would like to know, your Honor. It uses wire gauze instead of glass, and wood instead of metal.

Q. Does your company make any provision in connection with its electric signs for illuminating the sidewalk? A. Yes, sir.

(Deposition of Tracy W. Simpson.)

Q. Have you a model illustrating the provision which you have made for thus illuminating the sidewalk, and, if so, will you produce it?

A. Yes, I have such a model here.

Q. Does that illustrate the construction of the sign complained of herein, and which is shown in plaintiff's photograph exhibits 5, 6 and 7?

A. Yes, it illustrates the construction exactly or substantially.

Q. What is the function of the trough-shaped reflector in the bottom of that flame?

A. The function of the trough-shaped reflector is purely to throw the light downward onto the sidewalk. [201] It is in no way whatever of use in connection with the interior illumination of the sign, or the illumination of characters on the side of the sign.

Q. Why wouldn't it reflect any light from the interior?

A. There are two reasons why no light could be reflected from the lower reflector onto the characters of the sign; the first reason is that we have been careful to provide sufficient lamps behind the characters, providing usually one at the top of the character and one at the bottom, so that the lights provide all of the illumination necessary for the character, both top and bottom. Another reason is that the lower reflector is so far down in the body of the sign, so far away from the upper portion of the sign that by no possible chance could the light

(Deposition of Tracy W. Simpson.)

be reflected backwards to illuminate the lower portion of the characters on the side.

Mr. LOFTUS.—I offer this model in evidence.

The COURT.—Admitted.

(The model was here marked Defendants' Exhibit "EE.")

Mr. LOFTUS.—Q. Have you made a drawing or diagram illustrating the direction which the light rays would take from the back side of the trough-shaped member?

A. Yes, I have such a drawing.

Q. You have handed me a drawing here marked "Defendant's structure"; under whose direction was that drawing made?

A. This drawing was made under my direction.

Q. Does that model correctly illustrate the direction of the light rays emanating from the inside lips?

A. It does. This drawing is a correct representation to scale of the Normal Pharmacy sign. It is a sectional view.

Q. The red lines represent what?

A. The red lines represent rays of light coming from the centers of the filaments of the two incandescent lamps; it will be observed that these red lines [202] are shown to impinge the lower reflector and under the well-known optical principle that the angle of incidence must always equal the angle of reflection it will be seen that there is no possible way by which light may be reflected from the upper side back upward into the body of the

(Deposition of Tracy W. Simpson.)

sign, and in no way assist in lighting the characters on the side of the sign. Those light rays dissipate themselves on the lower crevices of the body.

Mr. LOFTUS.—I offer that in evidence.

(The drawing was here marked Defendants' Exhibit "FF.")

Q. Does the presence of that trough-shaped member at the bottom affect in any way the light on the letters in the sign above?

A. No, sir, it is entirely independent.

The COURT.—I think that is self-evident.

A. (Continuing.) If one were to draw an imaginary line, he would have in the upper part an electric sign, just the same as if it had been made in Seattle under the Seattle ordinance, and in the lower part he would have a border or strip of light, which is notoriously old.

Q. Have you read and do you understand the structure described in the second Hotchner patent in suit, 1315187, of September 2, 1919?

A. Yes, I have read it and understand it.

Q. Have you constructed or caused to be constructed a model illustrating any of the forms of that patent? A. Yes.

Q. I hand you a model of the letter "E," and ask you if you are familiar with the same?

A. Yes; this model was made under my supervision, in our shops, and illustrates the construction disclosed in the patent.

Q. In the second Hotchner patent?

A. In the second Hotchner patent, 1919.

(Deposition of Tracy W. Simpson.)

Q. What is the function of that trough-shaped member in the bottom of the box?

A. It has a double function; it has the upper part finished with reflecting paint, or in any other way made [203] reflecting, and is beveled so that the light from the upper lamp going downwards impinges against the reflector, and, acting on the optical principle that the angle of incidence equals the angle of reflection, is reflected in approximately a horizontal direction, and assists in the illumination of the bottom portion of the character.

Q. As I understand it, there is but one light on the inside of the box?

A. That is all that is disclosed in the patent.

Q. And in the model, exhibit "EE," which represents the defendant's construction, how many lights are employed on the inside of the box, customarily?

A. There are two lights employed in the model and customarily in commercial construction there would be two lights in all cases except where the letters on the face of the sign are exceedingly small, in which case one light would be sufficient to illuminate it completely.

Mr. LOFTUS.—I offer the model last identified by the witness in evidence.

The COURT.—Admitted.

(The model was here marked Defendants' Exhibit "GG.")

Mr. GRIFFIN.—If your Honor please, I have a gentleman here from the Board of Public Works. I would like to have him identify an application

(Deposition of Tracy W. Simpson.)

for a permit under which the other sign was erected, and let him go back to his work.

The COURT.—Submit it to counsel on the other side, and they will probably agree that that is a copy.

Mr. TOWNSEND.—Yes, your Honor.

Mr. GRIFFIN.—All right, if it is agreed that this is a copy.

Mr. TOWNSEND.—We just reserve the objection that it is immaterial, irrevelant and incompetent.

The COURT.—In view of your admissions here, it is utterly immaterial, because I do not think it is necessary you should bother with it, because they admit infringement, if it is infringement.

Mr. GRIFFIN.—Then I will ask you to have this identified as the copy of the application for a permit under which the other sign [204] was erected.

The COURT.—Very well.

(The document was here marked, Plaintiff's Exhibit 8.)

Mr. LOFTUS.—That is all for the present.

Mr. TOWNSEND.—We ask that the affidavit of Mr. Simpson be copied into the record at this point.

The COURT.—Very well; counsel can cross-examine the witness now.

(The affidavit referred to is as follows:)

“In the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 577.

“JOSEPH HOTCHNER,

Plaintiff,

vs.

“FEDERAL SIGN SYSTEM ELECTRIC, a Corporation, and TRACY W. SIMPSON, Doing Business as FEDERAL ELECTRIC COMPANY,

Defendants.

“Affidavit of Tracy W. Simpson.

“State of California,—ss.

“I, TRACY W. SIMPSON, being duly sworn, depose and say: I am a resident of Berkeley, County of Alameda, State of California; I am at present vice-president and Western District Manager of Federal Electric Company, a corporation organized under the laws of the State of California, and having a place of business in the City and County of San Francisco, State of California, and engaged in the business of manufacturing, selling and installing electric signs and other electrical apparatus.

“I am a graduate of the Hyde Park High School of Chicago, after which I spent one year in the University of Chicago, and thereafter three years in the Armour Institute of Technology, Chicago, graduating from the last-named college as a Bachelor of

Science in Electrical Engineering. In 1909 I entered the [205] employ of the International Harvester Company of Chicago, Illinois, in the Mechanical Department, where I remained for three and one-half years in various capacities, including Master Mechanic of one of the plants and Supervisors of Factory Methods. Following my services with the International Harvester Company I became Superintendent of the Chicago factory of the Hot Point Electric Heating Company where I remained for about one year. In August, 1914, I became Assistant Superintendent of the main Chicago factory of the Federal Electric Company, where I had charge of development work and had occasion to take various ideas coming from inventors and others and convert them into practical devices. In April, 1915, I came to San Francisco as Vice-President and Western District Manager of the Federal Electric Company where I now have entire charge of three factories, one at Emeryville, California, one at Seattle, Washington, and one at San Francisco, California. In the course of my duties as above referred to I have had occasion frequently to consider patents and am familiar with the reading of drawings and patent specifications.

“I have read and understand the device illustrated and described in Hotchner patent No. 1,259,237, dated March 12th, 1918. It belongs to the general class of interiorly lighted signs which had their origin as far back as 1861, one such being shown in the United States Patent to Little, No. 1,191, dated April 30th, 1861. For convenience I

shall refer to this Hotchner patent as the Hotchner patent of 1918. It comprises a box-like frame of sheet metal construction having a front part 10 cut away in the shape of the desired letter, the cut-away being pressed outwardly to form a raised border 11 outlining the letter. A pocket or recess is formed in the sheet metal front so that a sheet of glass 13 or other transparent or translucent material cut in the exact shape of the letter can be inserted therein so that it will lie in the plane of the sheet metal front 10, or, in other words, in line with the [206] sheet metal front. The pockets or recesses are formed in one of two ways; first, as shown in Figs. 1 and 2 where the base and inturned end 12 of the border itself forms the pocket; or, as shown in Figs. 3 and 4, where a separate pocket 21 is formed adjacent the base of the border. In either case the glass must be cut in the exact shape of the desired letter in order to enter said pocket. The provision of a pocket or recess, as illustrated and described, affords a support for the perimeter of the glass.

“Referring to the patent specifications, the patentee says (page 1, beginning line 41):

* * * ‘the letter construction is the important feature of the present case.’

“The patentee then goes on to state that this letter construction of his consists in so acting upon a sheet of metal as to press outwardly therefrom a molding ‘having an outwardly flare surface at 12, which molding will have the shape of the desired letter.’ It is thus to be seen that the letter, or the

molding defining the latter or border, is produced by *pressure*, presumably by a metal press or die.

“Continuing the patentee says (page 1, lines 51 to 57):

“ ‘This molding is *pressed* outwardly far enough so that a suitable sheet of translucent material 13 may be inserted under the molding and is held in place in the *plane of the sheet metal front* 10 by strips of sheet metal 14, soldered or otherwise secured to the inside of the front 10.’

“In the mechanical arts ‘pressing’ means ‘stamping’ or drawing in a flat bed machine, in which the metal is stretched into various shapes, whereas by the process of ‘forming’ we mean ‘bending’ or ‘shaping’ without necessarily producing stretching or drawing of the metal, but merely the bending of same. From this viewpoint the Hotchner border could be [207] produced only by ‘pressing’ in a drawing press or ‘forming’ by special tools out of the sheet metal constituting the front of the sign.

“Following the above statement of letter construction, there appears this misdescription (page 1, lines 62 to 71):

“ ‘The sheet of translucent material is not cut out the shape of the letter but covers the entire area defined by the length and breadth of the letter or character. By thus making the sheet of translucent material cover the entire outer area of the character without conforming to the outline of the letter, the cost of manufacture is reduced while the structure is actually stronger.’

“The same thought finds expression in claim 4 of the Hotchner patent:

“4. A sign comprising a sheet metal body with a raised molding formed therein to define a character, a sheet of translucent material covering the entire area of the space bounded by the greatest length and breadth of the letter back of the same, the edges of the molding toward the center of the elements of the letter lying substantially in contact with the translucent material, and means to illuminate the translucent material and through which the light shines.’

“The language thus quoted is quite clear in its intent, but it finds no justification in or application to a structure in which the ‘molding is pressed outwardly far enough so that a suitable sheet of translucent material 13 may be inserted under the molding and is held in place in the plane of the sheet metal front 10.’ (Hotchner specifications page 1, lines 51 to 55.)

“It is true that in Figs. 3 and 4 the patentee shows a modification of the Block Letter I, in which there is a raised portion 21 around the letter equal to the thickness of the translucent or transparent plate 22 to receive the letter so that it may approximately lie ‘in the plane of the metal front.’ [208]

“Except where a single *Block Letter I* or a like solid rectangular character is used, it is mechanically impossible, according to the construction shown and the description in plaintiff’s patent, to use a sheet of translucent material lying ‘in the plane of the metal front,’ which need *not* be cut out to the shape of the letter, and, at the same time, may cover ‘the entire area defined by the length and

breadth of the letter.' (Hotchner patent, page 1, lines 62-65). It is well known that every letter of the alphabet, except I, is either re-entrant, like the letters H, E, F, G, M, etc., or contain centers like the letters R, O, A, B, P, etc., which centers must be supported. In either case the re-entrant portions or the center portions absolutely prevent the use of a plane, rectangular sheet of glass, which at the same time is to lie in the 'plane of the metal' from which the molding is stamped.

"The only way that the glass could lie 'in the plane of the metal' from which the border is stamped would be for the glass to be cut out, before being assembled into the sign, into a shape exactly like the letter, and this applies equally to a construction according to Figs. 1 and 2 or Figs. 3 and 4 of the Hotchner patent. As a matter of fact in an effort to reconcile the description in the Hotchner patent above quoted (page 1, lines 62 and 71) with the rest of the Hotchner patent specifications and drawings, I did considerable experimental work in an effort to produce a sign in which the translucent material was not cut to the shape of the letter 'but covers the entire area defined by the length and breadth of the letter or character' and at the same time had the sheet of translucent material 'in the plane of the sheet metal front,' and it proved to be an impossibility; the only exception being where the Figure was a true rectangle like the Block Letter I or a rectangular hyphen.

"It, therefore, is seen that any reference in the specification [209] to the use of a sheet of trans-

lucent material not cut out to the shape of the letter but of an area corresponding to the length and breadth of the letter is not only erroneous but inconsistent with the rest of the Hotchner specification and with the drawings, except with respect to the single character which may be called a Block Letter I.

“Your affiant has examined a certified copy of the file wrapper and contents of the Hotchner patent of 1918 and finds that the above quoted statement from lines 62 to 71, page 1, was not a part of the original application as filed by Hotchner but was inserted by subsequent amendment.

“I have also examined the prior art set up in the Answer of the Defendants in this suit, and particularly the United States patent to Little, No. 32,195, of August 30th, 1861; United States patent to Hotchner, No. 769,139 of August 30th, 1904; French patent to Boldes, No. 335,943, of September 17th, 1903; the Prismatic Sign Company prior use; the Oregon Hotel prior use and the White Sewing Machine installation in Los Angeles, California.

“Comparing now the structure shown and described in the United States patent to Little, No. 32,195, with the construction shown and described in the Hotchner 1918 patent in suit, I find that Little makes use of a box-like frame made of sheet metal. The front of the frame, which Little calls the ‘sign board’ is shown as being made of wood. This front is cut away to form the desired letters. The borders of the letters are beveled and finished to give the effect of an outline moulding. A blank

sheet of glass or other translucent material is placed behind the front to allow the light to shine through. I have constructed a model of this Little sign and the result and effect, so far as lighting and appearance are concerned, are identical with that derived from the device shown and described in the Hotchner 1918 patent in suit. An optional method of forming the letter is [210] mentioned in the Little specification as follows: 'Instead of forming the flaring letters by beveling the edges of the sign board, the letters may each be made of metal, cast with these beveled edges and with flanges projecting from their flaring edges.' Such instructions would be sufficient to enable one skilled in the art to produce a sign substantially identical with the Hotchner patent of 1918 not only in appearance and effect, but likewise in mechanical construction. In fact, even lacking the alternative description of the Little patent, the skilled artisan of to-day would employ metal instead of wood for the front of the sign on account of greater ease in cutting and shaping the metal.

"Turning now to the construction shown and described in the Hotchner patent, No. 769,139 of August 30th, 1904, it will be noted that it pertains to an interior-lighted sign. A box-like frame is used having a front of 'wood or any other suitable material (lines 81-83, page 1, Hotchner specifications). A beveled border is placed upon the front in the outline of the desired letter. In Fig. 7 the front is shown as being constructed of wire gauze, which is filled in around the border in any desired

way but left transparent within the borders of the letters. The construction shown and described in Fig. 7 of this Hotchner patent of 1904 is substantially like the White Sewing Machine Agency installation shown in Defendants' Exhibits from Los Angeles, which I have actually seen in practice. I have also constructed a sign in accordance with Fig. 7 of said Hotchner patent of 1904 and found that it has substantially the same lighting effect that is obtained by the Hotchner 1918 patent, particularly when the two are viewed from the distance from which these signs are usually seen. In this connection I do not consider that the substitution of glass for wire gauze or a metal moulding for a wooden moulding involves anything more than mere mechanical skill or the judicious selection of materials. [211] Within my experience I have known of municipalities which passed ordinances prohibiting the use of glass in electric signs of this character on account of the danger of breakage and the likelihood of injury to pedestrians passing beneath. In those municipalities it thereupon became the custom to substitute wire gauze for glass. Likewise, in the case of the wooden outline moulding some of the cities have passed ordinances prohibiting the use of wood on or in connection with electric signs of this character. In those instances the only remaining choice was to employ metal in place of the wooden moulding.

"I have also examined the drawings of the French patent to Boldes, No. 335,943, and read a translation of the specifications of said patent.

The device disclosed is an interiorly lighted employing a box-like frame, the front of which is formed of a 'translucent or transparent plate of glass, celluloid, etc.' That part of the front surrounding the letters is made opaque in any desired way, and around the border of each letter is placed an outline moulding of 'metal, wood or any material.' I have constructed a full-sized sign in accordance with this disclosure and operated the same. The appearance of the sign and the lighting effect produced are substantially identical with the Hotchner patent of 1918.

"In regard to the prior use of the Prismatic Sign Company of Denver, Colorado, disclosed in Defendants' Exhibit M12 and A6, I have long been familiar with the construction and operation of the same. This so-called 'Prismatic Sign' has a box-like frame of sheet metal. The sheet metal front of the sign is cut away in the shape of the desired letter and around the border of each letter is placed a raised beveled border of metal. Behind the front wall is placed a blank sheet of glass covering the entire area of the space bounded by the greatest length and breadth of the letter. I regard this sign as the full equivalent of that shown and described in the Hotchner patent of 1918 both in [212] construction and operation. The only differences have to do with the use by Hotchner of a pocket or recess for the glass and the fact that Hotchner forms his moulding integral with the front wall of the frame. These differences, however have to do with details of construction which do

not affect in any way the appearance or operation of the sign.

“I have also seen the actual sign on Hotel Oregon, in Portland, Oregon, and which is shown in Defendants’ Exhibits from Portland, and am familiar with its construction and operation. It has a box-like frame formed of sheet metal. The sheet metal front of the sign is cut away in the shape of the desired letter. Around the border of each letter is placed a raised moulding of sheet metal soldered thereon. Behind the front wall is placed a blank sheet of glass covering the entire area of the space bounded by the greatest length and breadth of the letter. The lighting effect of this sign and the general appearance of the same are identical with the construction shown in the Hotchner 1918 patent. The differences are of a minor character and have to do with the shape of the outline moulding. The Hotel Oregon sign, while having a beveled element in the moulding, is not beveled in exactly the same manner as is shown in the Hotchner 1918 patent, but such differences are not noticeable to the eye when viewed from the usual distance at which the sign is observed.

“I am of course familiar with the interior-lighted signs put out by defendants and complained of in this suit, one such being shown in evidence. This sign employs a box-like frame of sheet metal. Its front is cut away to form the desired letter and a moulding is provided for the border of the letter, but such moulding is not ‘pressed from’ the sheet metal of the front wall, nor is it ‘formed therein.’

Rather, it is composed of a different material, such as lead, separately attached to the sheet metal front. A blank sheet of glass *not cut to the shape* of the letter is placed back of the sheet metal front and held in [213] place at its perimeter by means of clips. This glass therefore is *not* 'in the plane' of the metal front nor in line therewith, there being no pocket or recess of any kind whereby to bring the glass into line with, or into the plane of, the sheet metal front.

"So far as mechanical construction is concerned, there is a closer resemblance between defendants' structure and the structure represented by the Little patent, the Hotel Oregon prior use and the Prismatic Sign Company prior use, discussed above, than there is between defendants' structure and that shown and described in the Hotchner 1918 patent. This is true for the reason that the prior art devices referred to above all make use of blank sheets of glass or other translucent material not cut to the shape of the letter and not lying in a pocket or recess formed in the front wall of the sign, and all have outline moldings not pressed from, or found in, the sheet metal front. In fact, as between defendants' structure and the Prismatic Sign Company prior use, above referred to, I am unable to detect any mechanical differences worthy of mention.

"The principal differences between defendants' structure and the construction shown and described in the Hotchner 1918 patent can be summed up as follows:

“(1) Hotchner has a sheet of glass or other translucent material so arranged that the geometric plane of its back surface is coincident with the geometric plane of the back surface of the sheet metal front wall. In other words, Hotchner provides a pocket or recess for the glass or other translucent material so as to bring the glass into line with the wall of the sheet metal front and provide perimetric support for the same. Necessarily, therefore, Hotchner must employ a sheet of glass cut to the shape of the letter. Glass had been supported in almost every conceivable way previously. In fact, the distinguishing [214] feature of Hotchner is in the peculiar way that he cuts and bends his metal front so that in the one operation of cutting and bending he forms a letter and the beveled border and also a support for the letter. Defendants, on the other hand, have no pocket or recess for the glass, nor do they arrange the glass or other translucent material so that the plane of its back surface is coincident with the plane of the back surface of the sheet metal front wall. Therefore, they are enabled to make use of a blank sheet of glass which lies flat against the back of the sheet metal front wall and in a different plane therefrom. In place of the pocket or recess to support the perimeter of the glass, they make use of clips. It was common practice at the time of the Hotchner invention to support a piece of glass against a metal backing by means of clips or pieces of metal just as defendants and every other manufacturer of electric signs are and have been doing

for many years before the Hotchner application for patent in suit was filed.

“(2) Hotchner has a molding pressed from, or formed in, the sheet metal body, that is, he forms his molding integral with the sheet metal front wall by pressing it therefrom. Defendants use a molding of different material, such as lead, and solder it in place on the sheet metal body. Defendants’ use of a lead molding which can be bent and cut at will and then soldered or otherwise attached to the plain metal back and a separate attachment thereto of the lead molding naturally suggests the use of the separately attached moldings of the prior art. The use of a plain metallic front by defendants in which the letters have been merely cut out and leaving the sheet metal body without any forming or pressing of the molding is entirely foreign to the Hotchner method of pressing or forming the molding for the letter out of the sheet metal body itself and is not an equivalent.

“(3) Hotchner has an outwardly flaring bevel for his molding, [215] that is, a bevel molding which slopes outwardly from the margin of the letter. Defendants have an inwardly flaring bevel molding, that is, a molding which slopes inwardly from the margin of the letter. This difference in flare of the molding of bevels is something more than a mere matter of taste and design. Hotchner has no choice as to the way his bevels should be if he is to follow the instructions of his patent, which are to stamp his letter and his holding out of the sheet metal body and maintain the parts integral

and at the same time form a peripheral support for the sheet of glass to fit into the metal, as well as to accomplish the additional function of bringing the free edge of the molding into contact with the glass and thereby give support to the front of the glass. If he is to perform these functions, then we must bevel it in the way he shows and describes it. Hotchner's beveled integral molding is his sole support for the front of the glass, while the bent edges of the molding form the perimetric support for the glass. Defendants' molding is not a support in any sense for the glass, because the glass is simply pressed back against the back of the metal body. Defendants' molding is merely a matter of embellishment.

"I have likewise read and understand the construction shown and described in Hotchner patent No. 1,315,187 of September 2d, 1919, which, for convenience, will be referred to herein as the Hotchner 1919 patent. It belongs to the class of interlighted signs, and, so far as the sign proper is concerned, it consists of a box-like frame having its front cut away in the form of the desired character and a glass placed behind the cutaway portion to allow the light from within to shine through. The bottom of the box-like frame has a trough-shaped double reflector projecting upwardly within the frame. This trough-shaped member encloses one or more lamps at its under side, and the sign proper carries its own lamps at the top for illuminating the transparent character at the side. Both sides of the trough-shaped bottom member are

given reflecting surfaces, and this [216] trough-shaped member extends so far upwardly within the box-like frame as to cause the light from the upper lamp to be reflected out through the transparent character in the side of the sign. In addition, the trough-shaped reflector will direct the rays from the bottom lamp down to the sidewalk. The patent shows an alternative form, where a second sign is suspended from the main sign. This second sign will be illuminated by the lamp in the bottom of the trough-shaped reflector. Since, however, the sidewalk illumination will thus be interfered with a third lamp is positioned below the second sign.

“Various municipalities have for a long time had ordinances requiring sidewalk illumination in connection with all electric signs, and particularly signs of the interior-lighted type. This is especially true of Seattle, Washington, and Los Angeles, California, in the territory where the company of which I am Vice-president and Western District Manager operates. For instance, Ordinance No. 21308 of the City of Seattle, Washington, which has been in effect since August 8th, 1909, has at all times required that:

“‘Electric signs made entirely of galvanized iron, letters forms on each side of the sign, with one (1) and two(2) inch glass screw lenses, the two inch lenses with not less than a four (4) inch center, apart, and the one inch lens not less than a two (2) inch center, apart, illuminated from the inside with not less than two hundred (200) candle power to each sign, and more, if the size of the sign

shall require, bottom of sign left open to illuminate the sidewalk; will be allowed to be constructed and hung as provided for electric signs in this ordinance and as further set forth in this section.'

"The purpose of the requirement that the bottom of the sign be left open is to illuminate the sidewalk, and such requirement is satisfied by providing a separate set of lights to illuminate the sidewalk. In connection with such separate set of lights, [217] it has long been the practice to provide a reflector which will direct the rays therefrom downwardly to the sidewalk.

"In defendants' structure, with which I am familiar, there is a box-like frame in the front of which is the transparent letter. This letter is illuminated by a row of lights fastened to the upper part of the box and a second row of lights carried by a bridge arranged near the bottom of the transparent characters. At the bottom of the box-like frame there is arranged a trough-shaped member, which is formed with a reflecting surface only on its under side. The upper side of this trough-shaped member is unfinished and is not intended to reflect light from any of the lamps above, and, moreover, is so positioned with respect to the transparent characters as to make it impossible to reflect any light therethrough. The sole function of the trough-shaped member is to direct the light from the lowermost lamps downwardly to the sidewalk. In this connection the upper sign member is complete and operative without the presence of the trough-shaped member,

and, on the other hand, the trough-shaped member and its enclosed lamps are operated exactly the same if placed on any other support, such as steel braces or brackets.

“I have examined United States patent No. 775,295 to R. W. Clark, dated November 22d, 1904, and understand the structure therein shown. It comprises a sign body A which carried at each side a sign character 4. At the bottom of the sign body there is a row of lamps 11, in connection with which there is arranged a reflector having a surface 8 to direct the light from the lamps downwardly. This reflector constitutes means for intercepting the rays from the lower lamps when the sign is observed at some distance horizontally therefrom.

“I have also examined United States patent No. 1,070,028 to Fortman, filed December 6th, 1912, and issued August 12th, 1913, and understand the structure shown and described therein. [218] It is primarily intended for a signaling device, but embodies principles and structural features equally applicable to any form of illuminated sign. It comprises an illuminated sign consisting of the letter ‘L’ and ‘R’ (Fig. 1). These letters are illuminated by lamps contained in compartments 6 and 7. Beneath the compartments 6 and 7 there is a lamp arranged in a compartment 8 to illuminate the ground and license plate. By means of the opaque glass front 23 and the inside partition 4 the rays from the lowermost lamp are intercepted so that the latter light will not be seen when the sign

(Deposition of Tracy W. Simpson.)

is observed at any distance horizontally therefrom.

“TRACY W. SIMPSON.

“Subscribed and sworn to before me this 6th day of December, 1921.

[Seal]

“W. W. HEALY,

“Notary Public in and for the City and County of San Francisco, State of California.”

[Endorsed]: “14. No. 577—In Equity. In the United States District Court for the Northern District of California, Second Division. Joseph Hotchner, Plaintiff, vs. Federal Sign System Electric (a Corporation), and Tracy W. Simpson, doing business as Federal Electric Company, Defendants. Affidavit of Tracy W. Simpson. Filed Dec. 6, 1921. Walter B. Maling, Clerk. Chas. E. Townsend, Attorney at Law, 909-917 Crocker Building, San Francisco, California, for Defendants.”

Cross-examination.

Mr. GRIFFIN.—Q. With respect to your testimony, Mr. Simpson, you are testifying substantially and entirely as to a time subsequent to 1914, aren't you?

A. No, sir. Any portions of my testimony relating to events which plainly transpired since then naturally refer to such later dates.

Q. With respect to signs made by the company with which you are identified, all these dates have to do with times subsequent to 1914, have they not?

A. No, sir. [219]

(Deposition of Tracy W. Simpson.)

Q. You were not with the company prior to 1914, were you?

A. No, sir, but I was a resident of Chicago, which was the home office of that company, and I was in the electrical business and interested in electrical matters, and a personal friend of the company at that time, and what should be more natural than that I should be more or less familiar with the various devices they were selling at that time.

Q. How were you so familiar?

A. Because I was interested in electrical matters, was in the electrical business, and a graduate of an electrical engineering school at Chicago, and for many years have considered that I would go with the Federal Electric Company.

Q. Were you ever in their shop prior to that time? A. Yes, as long ago as 1911.

Q. As to the construction of the signs that you have spoken of, referring to the signs with the raised lead molding, none of those signs were made prior to 1914?

A. No, sir. Lead molding is a recent development for us.

Q. With respect to your local work here, what company was it that made the Normal Pharmacy sign; was it the Federal Sign System Electric, or the Federal Electric Company, or under what title was it?

A. It was made by the Federal Electric Company, a California corporation.

(Deposition of Tracy W. Simpson.)

Q. And at the time this complaint was filed, that company was not incorporated?

A. Yes, that company was incorporated at that time.

Q. At that time? A. Yes.

The COURT.—Were these two separate and distinct concerns, or one company operating under two different names?

Mr. TOWNSEND.—Separate companies, your Honor.

Mr. GRIFFIN.—Q. You were the manager of the Federal Sign Company?

A. The Federal Sign System Electric. I could explain in a very few words the question of names.
[220]

The COURT.—This suit is against the Federal Sign System Electric, a California corporation.

Q. That is the concern you are connected with, isn't it? A. No, sir.

Mr. GRIFFIN.—We had more difficulty in finding out who made these signs. Mr. Simpson, we knew, was connected with several companies.

Q. How many companies were you connected with using the name "Federal"?

A. Two companies.

Q. Two companies only?

A. Two companies only, yes.

The COURT.—Q. Are you connected with the Federal Sign System Electric, a California corporation? A. Yes, sir.

Mr. GRIFFIN.—Q. What is your connection

(Deposition of Tracy W. Simpson.)

with that company? A. Secretary.

The COURT.—Q. What is the Federal Electric Company?

A. The Federal Electric Company is a corporation which was incorporated in 1912 in California, under the name Federal Sign System Electric, but the name Federal Sign System Electric became a misnomer, due to the development of our business in other fields, and we desired to change it. So that in 1919 we made application to the Superior Court for a change in name. At the time that we reached a decision that we would change our name from Federal Sign System Electric to Federal Electric Company, in order that no interloper would incorporate as Federal Sign System Electric at the time we changed our name, thereby taking advantage of the good will, I personally regarded myself as doing business under the fictitious trade style of Federal Sign System, taking on business in that name for two or three months during the time our application for a change of name was being developed.

Q. The name Federal Sign System Electric was changed to Federal Electric Company then, was it?

A. Yes, and then after the change of name we organized another corporation comprised of a few men who [221] are now in the Federal Electric Company, in order that the name would still be protected and that no interloper could use the name Federal Sign System Electric.

(Deposition of Tracy W. Simpson.)

Q. What is your capacity with the Federal Sign Company?

A. There is no Federal Sign Company.

Q. Federal Electric Sign Company.

A. There is no such company.

Q. What is the true title of the company that made the Normal Pharmacy sign?

A. The Federal Electric Company.

Q. The Federal Electric Company?

A. Yes, sir.

Q. What is your position with that company?

A. I am vice-president and western district manager.

Mr. GRIFFIN.—In view of the witness' statement I would ask to amend the complaint, as it is recited here that it is believed that Tracy W. Simpson is doing business as the Federal Electric Company; I want to change that to corporation.

Mr. TOWNSEND.—That is rather a belated request, to bring in another defendant after the case is practically concluded.

Mr. GRIFFIN.—We exercised the greatest diligence in endeavoring to straighten out these names at the time this complaint was filed, and it was impossible for us to arrive at any closer conclusion.

The COURT.—Has there been any service on the Federal Electric Company?

Mr. GRIFFIN.—There has been service on Mr. Simpson. He is sued as an individual and as the Federal Sign System Electric and the Federal Electric Company.

(Deposition of Tracy W. Simpson.)

The COURT.—He is sued as an individual doing business as the Federal Electric Company. Of course, that would give the Court no jurisdiction, for the Federal Electric Company. You would have to bring them in and serve a subpoena on them. That is not very material at this stage of the game, however. Proceed. You would not only have to amend your complaint, but [222] you would have to issue a subpoena and bring them in.

Mr. GRIFFIN.—Q. With respect to the French patent to Boldes, you observed that the body of the sign was made of glass, did you not?

A. That portion of the body of the sign directly back of the letter is made of glass.

Q. And that the molding was fastened on to the glass? A. Yes.

Q. That would be a very fragile way to make an electric sign, would it not?

A. No, sir, provided the rest of the patent is carried out as it is disclosed in the description of the patent, which says that the background of the sign may be made opaque in any usual manner, which statement does not fail to include metal as such a usual manner of making glass opaque. We could cut out a sheet of metal and place it over that glass.

Q. However, there is no such disclosure as that in the patent?

A. It would be a very natural inference to anyone.

Q. I am not asking you that. There is no such

(Deposition of Tracy W. Simpson.)

disclosure as that in the patent, is there? Answer that "Yes" or "No."

A. There is a disclosure in the patent to the effect that that background may be made opaque by any ordinary means.

Q. However, there is nothing disclosed in the patent concerning the production of a sheet metal body with the raised molding outlining the character on a sheet metal body?

The COURT.—If the patent provides for making it opaque, the inference would be that it was glass or some other transparent article.

Mr. GRIFFIN.—Q. You are familiar with the claim in issue in this case, on the patent of 1918, are you not?

A. No, sir, I am not familiar with any claim.

Mr. TOWNSEND.—The matter of the claim is for the Court.

Mr. GRIFFIN.—The witness stated that he was familiar with the patent.

Mr. TOWNSEND.—He said he was familiar with the construction.

A. I don't claim to be a judge of claims. [223]

Mr. GRIFFIN.—Q. Then you don't know whether or not this construction—

The COURT.—Q. That was prepared from the drawings, was it? A. Yes, sir.

Mr. GRIFFIN.—Q. You don't know whether this construction, Defendants' Exhibit "Y," purporting to be the same as figures 3 and 4 of Hotch-

(Deposition of Tracy W. Simpson.)

ner patent 1259237, is in any way covered by the claim in issue in this case?

Mr. TOWNSEND.—That is an improper question.

The COURT.—He has so testified. He said that corresponds to the figures shown in the patent itself.

Mr. GRIFFIN.—Q. I will show you Plaintiff's Exhibit 5, and ask you with respect to the lower line of letters whether or not that line of letters, or, rather, I will ask you this way: Is not that lower line of letters shown in that sign in a different position with respect to the body of the sign proportionately from the letter shown in this model, Defendants' Exhibit "EE"?

A. No, sir, the relative position is the same in that a horizontal line drawn along the lower line of the letters "L. Chase, Clothier" is higher up than the top of the reflector underneath the sign by a distance of from one-half to three-quarters of an inch.

Q. What is the height of the letters in the lower line?

A. I don't recall exactly; I believe they are 10 inches high.

The COURT.—Q. These letters are not uniform in all signs, are they? A. No, sir, they vary.

Mr. GRIFFIN.—Q. How high would you say those letters were from the bottom of the sign?

A. Approximately 7 inches.

Q. Is it not a fact that the reflector inside of the sign is more than 7 inches deep?

(Deposition of Tracy W. Simpson.)

A. No, sir. We measured that very particularly since this came up.

Q. How deep into the sign does that reflector go?

A. I don't recall the exact figure as to the distance from the lower line of the lower line of letters to the bottom edge of the sign, [224] and the exact distance upwards that the reflector extends into the sign, but I do recall particularly that the difference between those dimensions was from one-half to three-quarters of an inch; that is to say, the distance upward from the lower line of the lower line of letters above the edge of the sign is one-half to three-quarters of an inch higher than the vertical height of the reflector upwards into the sign.

Q. That very fact would not preclude the reflection of some light from that reflector as it might in a sign such as you have shown here, where the height above the reflector of the bottom of the letter is approximately two inches?

A. It would preclude it; there is no possible way that that light could be reflected backwards up into the sign from a reflector, when the upper line of reflector is lower than the lowest line on the characters themselves.

Q. Is it not a fact that the light would be reflected into the body of the sign, and then back to the other side, and then out to the letters on the opposite side, if there were any?

A. No, sir, not with that form of construction.

Q. Examining the Little patent, 32195, I will ask

(Deposition of Tracy W. Simpson.)

you whether you obtained your information from the patent as to the production of the raised molding? I have a copy of the patent here. Is it not a fact that, examining the Figure 2, the letters are shown recessed in a body of wood?

A. I will answer your first question first; I obtained the information that the beveled outline of the letter as shown in my model of the Little patent could be of the construction exhibited in the model from lines 55 and following in the patent:

“Instead of forming the flaring letters by beveling the edges of the signboard, the letters may each be made of metal cast with these beveled edges with flanges protecting from their flaring edges.”

Q. However, there is nothing in what you have read that would in [225] any way indicate that the molding was to be raised above the body of the sign, is there?

A. An examination of the drawing will disclose that the flange is described—

Q. That is not what I am asking you. I will ask that you answer the question. I will ask the reporter to read it to you.

(Question read by the reporter.)

A. Yes, there is something here which would indicate that.

Q. Read it.

A. “The letters may each be made by metal cast with these beveled edges, with flanges projecting from their flaring edges.” The word “flange”

(Deposition of Tracy W. Simpson.)

indicates that the metal is formed outwardly in the shape of a flange, which must have thickness to it, and, therefore, it must rise above the level of the sideboard.

Q. But there is nothing said there definitely as to the molding rising above the signboard, is there?

A. No, sir, but the drawing plainly discloses it.

Mr. GRIFFIN.—I move that the latter part of the answer be stricken out as not responsive to the question.

The COURT.—Motion denied.

Mr. GRIFFIN.—As far as the testimony of this witness goes as given here, and outside of the affidavit, which I have not had an opportunity to read, I will close the cross-examination.

The COURT.—You are through with the cross-examination, so far as his examination in open court has gone?

Mr. GRIFFIN.—Yes, your Honor.

The COURT.—Very well. Is there anything further?

Mr. TOWNSEND.—Defendant rests. [226]

**Deposition of Joseph Hotchner, for Plaintiff
(Recalled in Rebuttal).**

JOSEPH HOTCHNER, recalled for plaintiff in rebuttal, testified as follows:

I made the invention shown in the 1918 patent in 1910. I had this model made soon after. It was built at 837 Ellis Street, our old factory. (The model was offered in evidence and marked Plaintiff's Exhibit No. 9.)

(Deposition of Joseph Hotchner.)

Mr. TOWNSEND.—Objected to as immaterial, irrelevant, incompetent, not proper rebuttal, and no proper foundation has been laid.

The COURT.—Objection overruled.

WITNESS.—(Continuing.) Mr. Meeks made that model at my request.

Mr. TOWNSEND.—We make the further objection that it is not made according to any teachings of the patent.

The COURT.—It may be admitted for what it is worth. Proceed.

WITNESS.—With respect to the other patent, the invention was made a few months later than this. I fix the date because I built a model of it myself, and I took one of these boxes—we had several of them—and I put the reflector into it and tried it out. This was done in our old factory. I don't know what became of that model. When we moved we lost a lot of things, and a lot of things got broke up. The first sign I sold made like Exhibit 9 was that to Max L. Shirpser on Market Street, in the 800 block. I can identify the order. The date was December 5, 1913. It was taken from our order book. It is an original entry. I am familiar with the order books of the Novelty Electric Sign Co.

Mr. GRIFFIN.—The patent application was filed October 19, 1914. This first sign was sold some 13 or 14 months prior to the application, well within the two-year period. I offer this order in evidence and ask to have it marked Plaintiff's Exhibit 10.

(Deposition of Joseph Hotchner.)

Mr. TOWNSEND.—Objected to as immaterial, irrelevant and [227] incompetent, and no proper foundation laid; it is a mere paper that does not prove its own contents.

The COURT.—He can use it for the purpose of refreshing his recollection, but it is not competent beyond that.

Mr. GRIFFIN.—That is all I am using it for.'

The COURT.—You have used it for that purpose. I will sustain the objection to its admission.

Mr. GRIFFIN.—You sustain the objection to the admission of the document in evidence?

The COURT.—I understand a man may use his books, or anything of that kind, to refresh his recollection, but that does not make the book competent evidence.

Mr. TOWNSEND.—That is right, your Honor, but he has not laid the foundation by showing that the witness needs to refer to it.

Mr. GRIFFIN.—Q. Referring to the order which I have just shown you, from Max Shirpser, do you know whether that order was ever filled?

Mr. TOWNSEND.—Objected to as calling for secondary evidence. If he has that original sign, that is the best evidence.

The COURT.—He can just use the order for the purpose of refreshing his recollection as to dates.

Mr. TOWNSEND.—That he sold some sign on that date.

The COURT.—Yes.

A. Yes, sir.

(Deposition of Joseph Hotchner.)

Mr. GRIFFIN.—Q. How was the sign sold to Max Shirpser under this order constructed?

Mr. TOWNSEND.—That is objected to as immaterial, irrelevant and incompetent. That is improper until he has shown some foundation that this sign is not in existence, because that is the best evidence.

The COURT.—A man can testify that he saw a horse and can describe it then and the horse need not be introduced in evidence. [228] You can't bring everything into court. I will allow the question to be answered.

Mr. GRIFFIN.—I might say that this sign is in existence and you can go down and look at it.

The COURT.—Proceed.

A. It was constructed in accordance with my patent.

Q. Which one? A. Claim 4.

Q. Of which patent? A. The first one.

Mr. TOWNSEND.—I move that be stricken out.

The COURT.—I suppose he means similar to the model that has been offered in evidence here.

Mr. GRIFFIN.—Q. I will show you a photograph and ask you if you can identify it?

A. Yes. The sign is there to-day. That is a photograph of it.

Q. Of what? A. Of that very sign.

Q. The Max Shirpser sign?

A. Yes. I think it is 910 or 912 Market Street, almost opposite Fifth Street.

Mr. GRIFFIN.—I offer the photograph in evi-

(Deposition of Joseph Hotchner.)

dence, and ask that it be marked Plaintiff's Exhibit 10.

Mr. TOWNSEND.—I object to it as immaterial, irrelevant and incompetent, and no proper foundation laid.

The COURT.—Objection overruled.

(The photograph was marked Plaintiff's Exhibit 10.)

Mr. GRIFFIN.—Q. I will show you the photograph and ask you to describe, for the benefit of the Court, the precise construction of the sign.

The COURT.—I suppose it is in accordance with the model you offered in evidence?

Mr. GRIFFIN.—It is in accordance with the model I am just about to offer in evidence, except in certain particulars.

Mr. TOWNSEND.—You say except in certain particulars; then that vitiates the comparison. This sign is not made according [229] to the patent, or anything like the patent.

The COURT.—Proceed. I don't want to take up too much time with these descriptions.

A. It is a box structure with the lights therein. On the face there is that raised molding in outline all around the elements of the letters. The letters are cut out from metal, the central portion, and the translucent material is back of them, white opal glass.

Mr. GRIFFIN.—Q. How is the molding secured?

A. Soldered on.

Q. Did you ever see the sign in Los Angeles re-

(Deposition of Joseph Hotchner.)

ferred to in this case as the White Sewing Machine sign? A. I did.

Q. What are the defects in such a sign as that?

Mr. TOWNSEND.—That is leading. It has not any defects, so far as we know.

Mr. GRIFFIN.—If your Honor please, there would be much that would be made clear if we had read all of these depositions. It is impossible at the time of this hearing, with the haste with which this proceeding is going through, to get all that matter before the Court.

The COURT.—Proceed.

A. It is a raised molding and wood around the elements of the letter, and has a gauze mesh between the letter and the body of the sign.

Q. Was that a satisfactory type of sign?

A. No, sir. It cannot be. The molding breaks, and it is practically prohibited by the laws of various counties and cities.

Q. Did you have anything to do with the original invention of that character of a sign?

A. Yes, it was my invention, but I could not make it pay because the sign was unsatisfactory; it was not a commercial article. We had had a sign up, and in the course of two or three months half of the letters would be broke away and split. [230]

The COURT.—Do you claim that the change from wood to some other material is invention?

Mr. GRIFFIN.—Not put in that way, your Honor. What we claim is that what claim 4 of this patent discloses is a valid invention, to wit, all of

(Deposition of Joseph Hotchner.)

the construction mentioned in that claim. We do not claim that simply changing from wood to metal—

The COURT.—Or from wire to glass.

Mr. GRIFFIN.—Or from wire to glass, is an invention. It requires the entire series of elements recited in the claim to make the invention valid.

The COURT.—Proceed.

Mr. GRIFFIN.—Q. Showing you the photograph, Plaintiff's Exhibit No. 5, and calling your attention to Defendants' Exhibit "EE," what have you to say with respect to the distance the lower line of letters is up from the bottom of the sign body, and the possibility of light being reflected from the interior of the sign through that lower line of letters after striking the reflector that normally reflects the light from the under side of the sign to the street?

Mr. TOWNSEND.—That is objected to, because this witness said on direct examination that he had no knowledge of the interior construction of the sign shown in the photograph Exhibit 5, and he never made any measurements.

The COURT.—Are you asking him to answer the question from an inspection of the photograph, or from measurements taken?

Mr. GRIFFIN.—From an inspection of the model and from an inspection of the photograph.

The COURT.—The photograph does not show anything in relation to that, I don't suppose.

(Deposition of Joseph Hotchner.)

Mr. LOFTUS.—No, your Honor, and it could not be accurate.

Mr. GRIFFIN.—It is so close, your Honor, that you can see it. [231]

The COURT.—A photograph can be so taken as to show almost anything. He may answer the question if he likes.

Mr. GRIFFIN.—Before he answers it I will ask him this question: Q. To what extent did you examine the signs illustrated in that photograph?

Mr. TOWNSEND.—That is not rebuttal.

The COURT.—Answer the question.

A. What was the question?

Mr. GRIFFIN.—Q. To what extent did you examine the signs illustrated in the photograph?

A. I examined the signs that—

The COURT.—He has testified to that before.

Mr. GRIFFIN.—Yes, I know he did.

A. I examined the sign from the street, and could look in and see the illuminator underneath, how far up it went. It went up far enough to take and close up the lamp, so that the bottom of the lamp did not protrude below the bottom of the sign.

Mr. TOWNSEND.—I move that the answer be stricken out because the witness is speaking from a conclusion, and without measurements, and he could not know where the lamps were on the inside of the box.

The COURT.—He said the electric bulbs did not extend below the bottom. That does not prove any-

(Deposition of Joseph Hotchner.)

thing to the court. The answer will stand for what it is worth.

Mr. GRIFFIN.—Q. As you were examining the sign at that time, could you tell about what distance that was?

A. About six inches.

Q. Are you familiar with the length of those lamps? A. Yes. The lamp is not six inches.

Mr. GRIFFIN.—That is all. [232]

Cross-examination.

Mr. LOFTUS.—Q. In regard to this sign that was made for Max Shirpser, did that sign have any patent dates on it?

A. Well, I could not tell that; I don't think so, but I could not tell that.

Q. What other signs did you put out at that time?

A. I didn't put any out after that for some time, because I made this sign by hand and it cost too much money to make it that way; we had to get dies made to strike out the letters, to stamp them out, and it took some time.

The COURT.—That is not responsive to the question. He asked you what other signs you put out, if any.

A. The first ones I think were put out in 1914; they were stamped out.

Mr. LOFTUS.—Q. What was the next one after the Shirpser sign?

A. I could tell by looking up our books, but I can't tell offhand. We began to put out a whole

(Deposition of Joseph Hotchner.)

lot of them then; I could not say right now which was the next one, but there are a whole lot of them out.

Q. Is it not a fact that the Shirpser sign bore the legend, "Patented August 30, 1904"?

A. Maybe it did; I could not say that it did or did not.

The COURT.—Is that the date of the first patent?

Mr. LOFTUS.—That is the date of the first patent.

Q. And is it not a fact that nearly all the signs you put out in subsequent years bore that date, "Patented August 30, 1904"?

A. It might have been so. That was prior to the time when I applied for this other patent.

Q. And even after you applied for this patent?

A. No, not after I applied for the patent.

Q. What is the patent marking on the sign reading, "Grocery," up on Bush Street; you installed that sign on Bush Street, between Powell and Stockton, didn't you? A. Yes. [233]

Q. When was that installed?

A. I cannot tell you without looking at the books.

Q. What is the patent marking on that?

A. I couldn't tell you that.

Q. You installed a sign reading, "Pine Garage."

A. Yes.

Q. When was that installed?

A. I should think that all those signs were put up in 1914, or possibly 1915.

(Deposition of Joseph Hotchner.)

Q. And what was the marking on the Pine Garage sign? A. I could not tell you.

Q. Down here on Market Street there is a sign reading, "Daylight Market"; you installed that sign, did you? A. Yes.

Q. When was that installed?

A. I think that probably was installed in 1916.

Q. What is the patent marking on that?

A. I could not say.

Q. Is it not a fact it is marked, "Patented August 30, 1904"? A. I don't know.

Mr. GRIFFIN.—This is all objected to as immaterial, irrelevant and incompetent, and not proper cross-examination.

The COURT.—He says he does not know.

Mr. LOFTUS.—Q. You stated that the sign in Los Angeles reading "White," embodied the same construction as shown in your 1904 patent?

A. No, not exactly.

Q. You said it was similar.

A. It was similar, yes.

Q. But you had reference to this construction, did you, that is, exhibit "DD"?

A. No, it is not this construction. It is a wooden outline, all right, but this mesh is very much heavier. I should think it is about a 16-inch mesh, and it is set between this letter and between this body of the sign; this is soldered on in the back.

Q. Do you know how long that Los Angeles sign, reading, "White" has been in use?

A. I could not tell you that, I don't recollect. I

(Deposition of Joseph Hotchner.)

have seen it, but I could not tell you how long it has been in use. I saw it there last spring and I saw it there, [234] I think, the year before. I cannot tell you how long it has been in use.

Q. The Shirpsers sign that you referred to, I understand that that had a molding that was soldered on.

A. We broke it to form a molding, and we soldered it all around, as the picture shows.

Q. This model exhibit 9, how long has that been on the shelf?

A. It has been knocking around; it has not been exactly on the shelf. In the beginning I went out with this, and I sold signs by it.

Q. The first sign you sold was the Shirpsers sign?

A. The first sign I sold was the Shirpsers sign.

Q. Prior to that time you had done nothing with it?

A. Prior to that time I had done nothing with it.

Q. You merely stored it away and left it?

A. That is all.

Q. When was this glass put *it* here?

A. We put in a number of glasses.

The COURT.—He is speaking about this particular one.

A. (Continuing.) That is impossible for me to say. It must be a number of years since this glass was put in. We broke lots of glass, as I or my salesmen went around, and we replaced it and with that re-gilded this a number of times.

The COURT.—Anything further?

(Deposition of W. W. Ferris.)

Mr. LOFTUS.—Nothing further.

Mr. GRIFFIN.—That is all.

Deposition of W. W. Ferris, for Plaintiff.

W. W. FERRIS, being called upon behalf of plaintiff, testified as follows:

My name is W. W. Ferris. I reside at 4211 Dalton Avenue, Los Angeles, California. I am engaged in selling and manufacturing electric signs, and have been so engaged for seventeen years continuously. I was in Denver, Colorado, from 1911 to 1914, at [235] different times. I am familiar with the electric signs disclosed in United States Patent No. 1,259,237 of March 18, 1918, made under license by the Novelty Electric Sign Co. of San Francisco, California, known as the "Luminus Electric Sign." I was in Denver in 1914 for the purpose of finding something new in the electric sign business. I was going to Los Angeles. My intention was to enter the manufacture of electric signs immediately on arriving in Los Angeles, and I stopped there for the purpose of finding anything new or looking for anything new that I might find there in the shape of electric signs. I was in Denver four days. I observed the business streets of Denver both by day and night, about the middle of February, 1914.

Q. Did you observe any Luminus Electric Signs on the streets of Denver at that time?

A. No; neither in the day time nor the night time. I had been in May's Department Store in

(Deposition of W. W. Ferris.)

Denver twice that I know of. I did not observe any Luminus Electric Signs in May's Department Store at that time. I passed 516 Sixteenth Street, the store being known as the "New York Floral Company." I did not observe any Luminus Electric Sign over or in front of the store with the word "Florist" on it. I passed No. 757 Broadway, in Denver, on this visit, but did not see a Luminus Electric Sign there with the words "DuBois" with "5 cents" underneath, neither in front of nor over this store. I passed No. 137 15th Street in the city of Denver on this visit, but did not see a Luminus Electric Sign with the words "Denver Electrical Company" either over or in front of this store at this time.

Q. If there had been a sign of this construction on display or in use at any of the places that I have mentioned, and of the character that I have mentioned, would you not have observed it?

A. Yes, I most surely would, for I was there for that purpose, in looking up new ideas, looking for something new. [236]

Q. At these places that I have mentioned outside of May's Department Store, did you pass by them both in the daytime and in the night-time?

A. Yes.

Q. 26. Are you familiar with the signs here in Los Angeles with a raised wooden molding around the letter characters? A. Yes.

Q. 27. When did you first see such a sign?

A. About 1915.

Q. 28. What does the sign read?

(Deposition of W. W. Ferris.)

A. It just reads "White"; that is, it was put up for the White Sewing Machine Company.

Q. 29. Do you regard this as a satisfactory sign or not?

By Mr. FENIMORE.—Now, just a moment. I object to that as calling for the conclusion of the witness and as leading and suggestive.

The WITNESS.—No.

(By Mr. ELDER.)

Q. 30. What are its defects?

By Mr. FENIMORE.—That is objected to upon the same ground.

The WITNESS.—The defects are that it is made of wood molding which screwed on to the face of the sign with screws and that the elements, that is, the weather, when it rains, the wood expands and cracks off, and it is, in my estimation, entirely unsatisfactory.

(By Mr. ELDER.)

Q. 31. Can it sell in competition with the Hotchner sign? A. No.

Q. 32. Why not?

By Mr. FENIMORE.—That is objected to as calling for the conclusion of the witness.

The WITNESS.—Because as it is made, it contains wood, and the ordinances prohibit any sign being made of combustible material.

(By Mr. ELDER.)

Q. 33. Why is it that the electrical departments in most of the cities object to the use of wood in connection with electric signs?

(Deposition of W. W. Ferris.)

By Mr. FENIMORE.—That is objected to as calling for the conclusion of the witness. [237]

The WITNESS.—Well, because they are inflammable and apt to start fires.

(By Mr. ELDER.)

Q. 34. What is the reason, Mr. Ferris, that these wood signs are not practical?

By Mr. FENIMORE. Objected to as calling for the conclusion of the witness.

The WITNESS.—Principally because they do not last and that they do not pass inspection for the reason that they are constructed of wood and are more or less dangerous; for the reason that they project out over a street usually, and they are not made to last as a metal sign would.

(By Mr. ELDER.)

Q. 35. Do you know whether or not there are ordinances in the principal cities of the country prohibiting the use of wood in electrical signs?

A. Yes.

Q. 36. You do know that? A. Yes, sir.

Q. 37. State whether there are such ordinances or not?

By Mr. FENIMORE.—That is objected to as not the best evidence.

The WITNESS.—Yes.

(By Mr. ELDER.)

Q. 38. Mr. Ferris, you stated that you had been in the electrical sign business, that is, both in selling and in manufacturing, for the past seventeen years; is that correct?

(Deposition of W. W. Ferris.)

A. Yes.

Q. 39. State by whom you have been employed during this period and what your duties were during this time?

A. My first appearance was with the Daugherty Operating Company, who own the Denver Gas & Electric Company, and several other large public utilities like at Scranton, Pennsylvania; Scranton, Pennsylvania, was my second move in the business.

Q. 40. What were your duties with this first company?

A. I was a salesman, but we were selling electric signs that were made by—some we had made by local manufacturers and others were made by experienced sign manufacturers. [238]

Q. 41. And you were selling electrical signs?

A. Yes, sir.

Q. 42. As such salesman, was it your duty to keep posted with all the different kinds of signs in use?

By Mr. FENIMORE.—That last question is objected to as leading.

The WITNESS.—Yes. They frequently sent us from one city to another to investigate or to get new ideas, you know; that was the principal thing.

Q. 43. (By Mr. ELDER.) Where was your next experience?

A. My next experience was at Syracuse, New York, where I placed one hundred thousand lamps in twenty-seven months. I manufactured most of the signs that were erected in the city of Syracuse,

(Deposition of W. W. Ferris.)

under my direction, and I sold them through the Syracuse Lighting Company.

Q. 44. Was it still your duty, at that time, to keep posted on any new ideas in the electrical sign business?

By Mr. FENIMORE.—That is objected to as leading.

The WITNESS.—Yes. During my stay there I made several trips and sold a good many signs for the United Gas & Improvement Company, the Syracuse Lighting Company being one of the subsidiary companies of the U. G. & I. Philadelphia, and they had properties scattered all over the country. One place that I started an electric sign campaign was at Charleston, South Carolina, and Johnstown and Gloversville, New York.

(By Mr. ELDER.)

Q. 45. What was your next experience in the electrical sign business?

A. My next experience was in taking charge of the new business department of the Federal Light & Traction Company at 60 Broadway, New York. They had about twenty gas and electric and street railway properties scattered from coast to coast and from Canada to Old Mexico, and it was my duty to go into these different cities and towns and promote the electric business generally, and, usually, in starting a campaign in any of these cities, the first thing we did was to put out a bunch of electric signs. Up at Aberdeen, Washington, I went there and hired [239] four or five men and we put in

(Deposition of W. W. Ferris.)

sixty-one electric signs in six weeks' time. That, I believe, was a world's record. They were all real electric signs, and that was only one of the companies. Now, I have sold signs in Sheridan, Wyoming, and Montrose, Colorado, and Trinidad, Colorado, and different places.

Q. 46. Well, I will ask you, generally, if, during all of this time, it has been a part of your business to observe the nature of electrical signs, their appearance and any new features connected with such signs?

By Mr. FENIMORE.—That is objected to as leading.

The WITNESS.—Yes, sir.

By Mr. ELDER.—That is all.

Cross-examination.

(By Mr. GEORGE W. FENIMORE.)

XQ. 47. What company are you at present connected with, Mr. Ferris?

A. The Greenwood Advertising Company.

XQ. 48. Located in Los Angeles, California?

A. At 1942 South Main Street, Los Angeles, California.

XQ. 49. Does the Greenwood Advertising Company have the agency for the Hotchner sign?

A. They do now, yes, sir.

XQ. 50. How long have they had that agency?

A. About four or five months; four months.

XQ. 51. Do you recall the occasion of your first visit to Denver in 1911? A. Yes.

(Deposition of W. W. Ferris.)

XQ. 52. At that time, did you observe any Luminus signs on display in that city? A. No.

XQ. 53. Were any of Mr. Hotchner's signs on display there at that time? A. No.

XQ. 54. Did you, at that time, know that Mr. Hotchner had devised a sign of any kind?

A. No.

XQ. 55. Did you know Mr. Hotchner at that time, or know of him? A. No, sir.

XQ. 56. Had you ever heard of him at that time?

A. No, sir. [240]

XQ. 57. What was the earliest date that you knew of Mr. Hotchner and his work?

A. About two and a half years ago.

XQ. 58. About 1918 or 1919, then?

A. Well, I would say, yes, 1918, the beginning of 1918, I would say.

XQ. 59. Prior to 1918, had you ever seen any signs which were of the same character as Mr. Hotchner's signs?

A. The only one that I saw was this White Sewing Machine sign that I mentioned.

XQ. 60. And what was the date that you first saw that sign? A. About 1915.

XQ. 61. Are you familiar with Mr. Hotchner's patent of 1904?

By Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial.

The WITNESS.—No.

(Deposition of C. B. Thorne.)

(By Mr. FENIMORE.)

XQ. 62. Have you ever seen any sign made under that patent?

By Mr. ELDER.—The same objection.

The WITNESS.—No, for the reason that I did not know what the patent was. I may have seen it, but I do not know that I have seen it.

(By Mr. FENIMORE.)

XQ. 63. Did you ever hear of a Mr. Mackenzie?

A. No.

XQ. 64. You never saw any signs made or purporting to have been made by Mr. MacKenzie?

A. No, I never did.

XQ. 65. What is your capacity or position with the Greenwood Advertising Agency?

A. Salesman.

•XQ. 66. Salesman? A. Yes, sir.

By Mr. FENIMORE.—That is all.

By Mr. ELDER.—That is all. [241]

Deposition of C. B. Thorne, for Plaintiff (In Rebuttal).

C. B. THORNE, called for plaintiff in rebuttal, testified as follows:

My name is C. B. Thorne. I am 47 years of age, and reside at 1145 Pine Street. I am attending to my own investments. I lived in Denver from 1884 to 1920. In 1912 I was Deputy City Electrician of Denver. I had the supervision of the inspectors, OK-ing permits, also the certification of permits from the electrical department to the board of

(Deposition of C. B. Thorne.)

public works for the issuance of permits for the erection of signs.

Q. What do you do outside the office, if anything?

A. I take care of special inspections from time to time.

Q. What did that consist of?

A. To go out and inspect electric signs, and electrical connections, and so on and so forth.

Q. Do you ever remember inspecting the electric sign for the Denver Electrical Company, erected by the Prismatic Sign Co.? A. Yes, sir.

Q. I will show you a series of photographs, and also a ticket, and ask you if you can explain anything in connection with them, and can identify them?

The COURT.—Are these already in evidence?

Mr. GRIFFIN—No, they are not in evidence. One of the witnesses testified, if your Honor please, that this sign was erected and had this metal molding on it. This witness will testify that at the time of inspection it was a flat sign without molding, and that the molding was put on afterwards.

The COURT.—Proceed. You had better call his attention to that specific sign. When were these photographs taken?

Mr. GRIFFIN.—These are photographs that the witness made in Denver. He did not make the photographs—we don't wish to mislead the court upon that point.

Q. Do you recognize the matter purporting to

(Deposition of C. B. Thorne.)

appear upon these photographs? A. Yes, sir.
[242]

Q. Will you state what it is?

Mr. TOWNSEND.—If your Honor please, that is calling for secondary evidence. Apparently, these are photographs of papers not in evidence. There is no proper foundation laid for secondary evidence, even if competent. We do not know, yet, whether it is competent or relevant.

Mr. GRIFFIN.—Q. At the time you were the inspector in Denver, were you familiar with the records of the Department of Electricity?

A. Yes, sir.

Q. Did you examine the books, there?

A. Yes, sir.

Q. How many times?

A. Daily, two or three times a day.

Q. For how long a period?

A. For a year or so.

Q. Can you identify the matter appearing upon the photographs before you?

Mr. TOWNSEND.—That is objected to as immaterial, irrelevant and incompetent, and upon the further ground that it neither tends to prove nor disapprove any issue in this case.

The COURT.—You are seeking to prove a record by a photographic copy not certified or authenticated in any way.

Mr. GRIFFIN.—I am undertaking to prove by a man who was an official at that time the contents of the official records.

(Deposition of C. B. Thorne.)

The COURT.—The laws of the United States provide a method for authenticating these records and proving them; the only way you can prove them is by producing the authentication or by the original record. Of course, if it were a record which could not be produced here, you might possibly take the deposition of the party and produce a sworn copy. Objection sustained.

Mr. GRIFFIN.—Q. Did you inspect the electric sign erected for the Denver Electric Company, or do you know who inspected it?

A. Yes, I inspected it.

Q. Do those photographs in any way refresh your memory as to the condition of that sign at the time of the inspection? [243]

Mr. TOWNSEND.—The same objection.

The COURT.—You are assuming the very question that the Court has ruled on, that these copies are authentic. If he examined it he can probably testify independently of these records.

Mr. GRIFFIN.—Q. Can you testify as to the state of the electric sign erected for the Denver Electrical Company by the Prismatic Sign Company at the time of its erection in 1912?

A. In regard to the erection of the sign covered by these permits and at that date, I can.

Q. What was the state of that sign?

A. It was a flat letter sign.

Q. I will now show you a cross-section of an electric sign marked Defendants' Exhibit "A-6," and,

(Deposition of C. B. Thorne.)

as testified in this deposition, it is said to be a section cut from the Denver Electrical Company's sign, made by the Prismatic Sign Company, and I ask you if the molding shown on that sign was on it at the time you inspected the sign?

A. It was not.

The COURT.—Q. What year was that—1912?

A. 1912.

Mr. GRIFFIN.—I might say, your Honor, in respect to this particular sign, this is the only sign whose public use is proved definitely as being more than two years prior to the filing date. There are some other signs referred to by these same witnesses who testified that this was a raised-letter sign at this time.

The COURT.—I understand that. Proceed with the examination.

Mr. GRIFFIN.—Q. Do you remember how soon after this the raised-letter signs came into use in Denver?

A. No, I could not testify to that.

Cross-examination.

Mr. LOFTUS.—Q. Do you know how many signs the Prismatic Sign Company erected for the Denver Electrical Company?

A. I could not say for sure how many signs they erected for them.

The COURT.—Does the deposition show where this sign was?

Mr. LOFTUS.—Yes, your Honor. [244]

(Deposition of C. B. Thorne.)

The COURT.—Where was the sign from which this was taken?

Mr. LOFTUS.—It was in front of the Denver Electrical Company.

The COURT.—Q. That was the sign you examined and inspected, was it? A. Yes, sir.

Mr. LOFTUS.—Q. Did you know that there was more than one sign erected by the Prismatic Sign Company for the Denver Electrical Company?

A. Yes, I did.

Q. Are you familiar with both of those signs?

A. No, I am not.

Q. And you don't know from memory, now, which of these signs had the border and which did not?

A. I know that the sign that I inspected and the sign that was held up on account of permits from the Board of Public Works was all flat letters at the time it was inspected.

Q. There may have been another sign, so far as you know, that had the molding?

A. Yes, there may have been.

Q. At about that time?

A. No, sir, not at that time.

Q. You are testifying now just from your impression, after a lapse of 10 or 11 years?

A. Well, I had occasion to inspect the sign later on.

Q. When did you first have this matter called to your attention recently?

A. About a month ago, or two months ago.

Q. In what way did it come to your attention?

(Deposition of C. B. Thorne.)

A. Mr. Hotchner's attorney, I think, had certain people in Denver looking for me, and finally located me out here, and called on me.

Q. And he showed you a photograph of a permit, did he? A. No, sir, not at that time.

Q. He asked you if you recalled inspecting a sign for the Denver Electrical Company?

A. Yes, he did.

Q. And you told him that you did?

A. Yes, sir.

Q. And you described that sign to him?

A. I think I did.

Q. And you were familiar with only one flat sign?

A. The sign that I inspected, that is really the only one I am familiar with. [245]

Redirect Examination.

Mr. GRIFFIN.—Q. When did you last see the sign? A. I saw a sign there last June.

Q. Was that sign the same or different from the one you inspected in 1912?

A. The sign I saw in June had both raised and flat letters.

Q. Was it the same or different from the one you inspected?

A. It was different from the one I inspected.

Deposition of Joseph A. Meeks, for Plaintiff (Recalled in Rebuttal).

JOSEPH A. MEEKS, recalled for plaintiff in rebuttal.

Mr. GRIFFIN.—Q. I will show you a sign that has been previously marked Plaintiff's Exhibit 9,

(Deposition of Joseph A. Meeks.)

and ask you if you have ever seen that sign before?

A. Yes, sir.

Q. When, if you know?

A. I have seen it several times.

Q. When did you first see it?

A. That is hard for me to fix a definite date; I made the model myself.

Q. When did you make it?

A. I should judge that it was made in 1910, the latter part of 1910.

Q. How do you fix that date?

A. I fix the date, because I remember taking the model before we left Ellis street; we were at 165 Eddy Street ten years last July.

Q. Since the morning session of this court, did you go over to Oakland and examine the signs testified about this morning? A. I did.

Q. Did you look inside there? A. Yes, sir.

Q. I will show you a photograph heretofore offered in evidence, carrying the words, "Harry Rose, Haberdasher," and "Al. Chase, Clothier," and ask you with respect to the lower line of letters reading, "Al. Chase, Clothier," whether or not, in your opinion, it is possible for light proceeding from the upper lamps to be— [246]

The COURT.—He may answer.

A. In my opinion it does reflect.

No cross-examination.

**Deposition of Edward Boylan, for Plaintiff
(In Rebuttal).**

EDWARD BOYLAN, called for plaintiff in rebuttal, testified as follows:

I have examined a sign in Oakland heretofore referred to in this case, bearing the words "Harry Rose, Haberdasher" and "Al. Chase, Clothier," at a quarter past one. I looked inside those signs.

Q. Referring to the words, "Al. Chase, Clothier" I will ask you whether in your opinion the light proceeding from the lamps inside the sign and against the reflectors in the bottom of that sign, which normally send the light from the outside of the reflector to the street, would direct any light through those letters, or not?

Mr. TOWNSEND.—That is objected to as no proper foundation has been laid.

The COURT.—Unless the man experimented, or has some knowledge of those things, his opinion would not be worth anything.

The WITNESS.—(Continuing.) I have been engaged in the sign business about fifteen years in San Francisco. I put up signs in Oakland. In my time I have erected an average of about five signs a week.

The COURT.—Answer the question.

Q. Could any light from the interior of the signs pass against the reflectors at the bottom of the sign and through the letters "Al. Chase, Clothier."

A. I don't think I know what you mean. Do you

(Deposition of Edward Boylan.)

mean the light from the letters that throw out onto the sidewalk?

Mr. GRIFFIN.—No, I mean the light from the inside of the sign proceeding down against the inside reflector here which is shown in this photograph, and then from there against the letters “Al. Chase, [247] Clothier.” A. I believe it could.

The COURT.—This question is susceptible of demonstration, and should not depend on the haphazard testimony of witnesses. Proceed.

Deposition of T. N. Slocum, for Plaintiff.

Plaintiff thereupon called T. N. SLOCUM, who testified as follows:

My name is T. N. Slocum. I reside at the Hotel Washington. I am 36 years old. I am an electric light salesman. I have seen a sign in Portland reading “Hotel Oregon.”

Q. I might say that the photograph of this sign has been heretofore introduced in evidence; will you state to the Court how the sign is constructed, with respect to its appearance, in the flanges surrounding the elements of the letter?

Mr. TOWNSEND.—Objected to as not proper foundation has been laid.

The COURT.—He said he saw it.

Mr. TOWNSEND.—But that does not indicate anything.

The COURT.—To what particular time did the testimony of your witness relate?

Mr. LOFTUS.—The installation was in 1911.

(Deposition of T. N. Slocum.)

The COURT.—Q. When did you first see it, and how often did you see it?

A. For the last two years that I have been traveling in and out of Portland.

Mr. GRIFFIN.—There is no controversy as to the condition of the sign.

The COURT.—Let him answer the question.

A. It is a cut-out transparency sign, with what is known as a channel border.

Mr. GRIFFIN.—Q. How do the flanges extend from the outside of the channel border?

A. The flange extends out at right angles to the body of the sign, and then there is a little flange that extends out from this channel, that is on a horizontal plane with the body of the sign.

Q. Referring to Plaintiff's Exhibit No. 9, would you say that that [248] Hotel Oregon sign was the same or different from this?

A. No, it is not like that.

Mr. GRIFFIN.—That is all.

Mr. TOWNSEND.—No cross-examination.

Mr. GRIFFIN.—That is all, your Honor.

The COURT.—If there is to be any further cross-examination on this affidavit, it may take place tomorrow morning. I suppose it will be brief.

Mr. GRIFFIN.—Yes, it will be brief, if there is any.

The COURT.—You have nothing further to offer, I suppose?

Mr. TOWNSEND.—No, your Honor, we rest.

(Deposition of Tracy W. Simpson.)

The COURT.—We will take an adjournment until to-morrow morning at ten o'clock.

(An adjournment was here taken until to-morrow, Wednesday, December 7, 1921, at ten o'clock A. M.)

Wednesday, December 7, 1921.

Mr. TOWNSEND.—Your Honor, I will recall Mr. Simpson to the stand, and I desire to ask him a few questions before counsel cross-examines him.

The COURT.—Proceed.

**Deposition of Tracy W. Simpson, for Defendant
(Recalled).**

TRACY W. SIMPSON, recalled for defendant.

Mr. TOWNSEND.—Q. In your examination, Mr. Simpson, you referred to various types of signs that had been made by your companies, including the flat type which is in evidence, with the letter without any border, and glass backing up that letter; you also referred to another type in which there was a channel border around the letter; can you produce a sample of the channel type [249] of letter?

A. Yes, I have such a sample with me here.

Q. How long has such a construction, such as you hold in your hand, been on the market?

A. To my personal knowledge this form of construction has been on the market since 1911.

Q. Is that a type of construction used to-day?

A. Yes, it is in very considerable use; in fact, it often has been used by the plaintiff and no patent

(Deposition of Tracy W. Simpson.)

marks were shown on the construction put out by the plaintiff similar to this.

Q. How recently have you seen one of the plaintiff's?

A. I saw one on Market street this morning as we walked up to this building.

Mr. TOWNSEND.—We offer this in evidence, your Honor.

(The model was here marked Defendants Exhibit "HH.")

Cross-examination.

Mr. GRIFFIN.—Q. The type of letter that you have just spoken of and just identified is known as the channel type letter in the trade, is it not?

A. By some, yes; it also has another designation, of a flat glass transparency sign with a strip metal outline around the letter.

Q. This type of sign with a raised flange of this kind is known throughout the trade as a channel letter sign?

A. No, sir, I would not say so. To my knowledge, the designation "channel letter" as a rule, pertains to signs using exposed lamps on the outside of the sign, and the channels are very deep, over an inch or so.

Q. However, whether the channel is deep or shallow, it is still called a channel letter, whether it is interiorly illuminated or exteriorly illuminated, with a series of lamps exterior to the sign?

A. Yes, sir.

(Deposition of Tracy W. Simpson.)

Q. Where was this sign that you say you saw that was installed by the plaintiff?

A. The sign reads "Shoe Mart," with various numbers underneath, specifying the prices of shoes. It is on the north side of Market street, a block or so east of this building.

Q. You don't know when that was put up?

A. It was put up recently. [250]

Q. In your affidavit you state you are familiar with the reading of drawings and patent specifications: Is that a fact? A. Yes, sir.

Q. You understand the wording of the claim in issue in this case, that is, in the first patent, Claim 4?

Mr. TOWNSEND.—Your Honor, this witness has not testified as to the construction of claims; the construction of claims is for the Court.

The COURT.—Yes. I don't know what is in the affidavit.

Mr. GRIFFIN.—The witness stated he was familiar with drawings and specifications in patents. I am entitled to cross-examine him as to whether he is familiar with that matter. He inserted in his affidavit the claim in issue in this case, and says, "The same thought finds expression in Claim 4 of the Hotchner patent."

The COURT.—Answer the question.

A. Yes, I am familiar with that claim so far as I am a judge of claims.

Mr. GRIFFIN.—Q. In that claim you don't find the word "pressing," at all, do you?

(Deposition of Tracy W. Simpson.)

Mr. TOWNSEND.—I object to that, because the claim is the best evidence.

The COURT.—Answer the question.

A. I find the word “formed,” which is a synonymous process, as I further stated—“formed therein.” You may have any number of formings without any pressing. The affidavit states in detail the meaning of forming and pressing as generally understood in the mechanical art.

Q. But, as a matter of fact, forming is not at all an equivalent of pressing?

A. That is fully stated in the affidavit.

Q. Just answer the question, never mind the affidavit.

A. Yes, it is very generally an equivalent. “Forming” means [251] bending; “pressing” means bending, sometimes with stretching. The two terms are very nearly synonymous.

Mr. GRIFFIN.—Q. You might form that box, I might form something but not bend it or press it.

A. Not in the mechanical arms. To form that border as shown in the Hotchner patent—

The COURT.—I suppose that Webster is as good an authority on definitions as any witness you might call. I don’t see any necessity for this.

Mr. GRIFFIN.—I will let that go.

Q. I show you Plaintiff’s Exhibit No. 9; it is a fact that there is no element in the claim that is not present in this exhibit, is it not?

Mr. TOWNSEND.—The same objection.

(Deposition of Tracy W. Simpson.)

The COURT.—I think that calls for a conclusion which the Court must draw.

Mr. GRIFFIN.—The witness has testified concerning the claim, as to this being found in the claim. I am entitled to cross-examine the witness. I am not seeking here to examine the witness concerning the legality of the claims.

The COURT.—Do you say that this is a technical question, as to what is covered by the claims?

Mr. LOFTUS.—The affidavit deals solely with what is shown and described in the patent, and leaves the claims alone.

The COURT.—I don't care what the affidavit shows; I am only concerned with the general proposition whether it is for the witness to state what is covered by the claims, or for the Court.

Mr. GRIFFIN.—It is for the Court to state it.

The COURT.—Then I don't care what is in the affidavit; I will ignore it. [252]

Mr. GRIFFIN.—I am entitled to examine the witness as to the sundry elements of the claim and as to what the parts of the claim are. As to the total effects of the claim, that is for the Court.

Mr. TOWNSEND.—Counsel can examine as to the disclosure of the patent and the description of the drawings; in regard to exhibit 9, it is not in issue in the case, it is a self-serving model that was made years ago, and long before the patent was applied for; it does not even have the rudimentary elements of the patent. It is wholly immaterial.

(Deposition of Tracy W. Simpson.)

The COURT.—Proceed and get through with the testimony.

Mr. GRIFFIN.—Q. Your signs made for the Normal Pharmacy have means inside the sign body to illuminate the letters, haven't they?

A. Yes, sir.

Q. That sign also has a sheet metal body with openings forming the characters? A. Yes.

Q. That sign also has a sheet of translucent material covering the length and breadth of the letters inside the sign body. A. Yes, sir.

Q. And there is also a raised-letter molding around the elements of the character?

A. If you are trying to read me the elements of the claim—

Q. Is there or is there not a raised metal moulding around the elements of the character on the Normal Pharmacy sign?

A. There is a strip of lead soldered around the periphery of the letter.

Q. And that is raised from the face of the sign?

A. Yes, sir.

Q. You say you did some work to show the impossibility of making a sign according to the disclosure of the patent; what work was done?

A. I spent about half a day in the shop with several skilled artisans, endeavoring to see if it were possible to do that; I even had some drawings with me to show the impossibility [253] of it. In the patent drawing of the Hotchner 1918 patent,

(Deposition of Tracy W. Simpson.)

No. 1259237, had the person making up that drawing shown several other sections, other than the section shown in Figure 2, that would plainly have become apparent.

Q. However, you did finally make the letters which you exhibited here in court?

A. We made those letters that conform to the specifications of the patent with the exception of the misdescription portion of the patent relating to the glass covering the entire area bounded by the greatest length and breadth of the letter.

Q. Why do you say that is a misdescription?

A. Because the disclosure of the patent plainly shows that the glass lies in a pocket, which pocket is bounded on its perimeter by a portion of the raised metal molding. If I may be permitted to turn around one of those cards, we have the reverse side section; the sectional drawing that I have in my hand is exactly the same sectional drawing that might have been made by the draftsman who drew the original drawings of the Hotchner patent of 1918, provided he had sliced the sign vertically through the cross-bar of the letter H instead of doing as he has done in Figure 2—sliced the sign vertically through the main right-hand stroke of the letter H; this plainly shows that the glass of the cross-bar could only be of an extent extending from the upper limit designated by the raised border to the lower limit designated by the raised border of the cross-bar, there being a pocket in

(Deposition of Tracy W. Simpson.)

which the glass is placed. Were any other construction used, then we would have the entirely erroneous construction in which the background of the sign which is between the vertical strokes of the letter "H" and above the cross-bar pressed outwardly, which is not a disclosure of the patent.

Q. However, with respect to the letter "I," there is no misdescription, whatever, is there?

A. No, sir, not with respect to [254] the letter "I." That was the only letter.

Q. And that might be so with respect to any other letter?

A. No, sir; it could only be with respect to the letter "I." There would be a misdescription when applied to any other letter.

Q. However, there is no difficulty whatever in making exactly what is described in the patent, such, for example, as shown in Plaintiff's Exhibit 9, and it would conform to the disclosure of the letter "I"?

A. There would be no difficulty, provided the letter "I" were always produced.

Q. However, the letter "N" is shown here, and that is according to the construction of the letter "I" as shown in the patent, isn't it?

A. No, sir, because the glass in the letter "N" does not lie in the plane of the metal front.

Q. However, as to this particular claim in issue here, there is nothing said about any pocket in which the glass is placed.

(Deposition of Tracy W. Simpson.)

Mr. TOWNSEND.—The claim is the best evidence of its contents, and it is for the Court to construe it; that is calling for a legal conclusion.

The COURT.—I think so.

Mr. GRIFFIN.—Q. With respect to the Oregon Hotel sign, that sign consists of an interiorly-lighted sign, having channels with flanges at the outside of the channels extending parallel to the face of the sign body, doesn't it? A. No, sir.

The COURT.—Isn't there a photograph of the Oregon Hotel sign here?

Mr. TOWNSEND.—Yes.

The COURT.—I have one in my mind; I suppose there is one in the record, probably.

Mr. TOWNSEND.—Yes, there is, your Honor.

Mr. GRIFFIN.—Q. I will show you a photograph, which is a copy of the photograph in evidence—

The COURT.—This shows how the letters are made. [255]

Mr. GRIFFIN.—Q. Is it not a fact that those flanges are parallel to the face of the sign body?

A. No, sir, the flanges are beveled with respect to the sign body.

Q. You heard Mr. Slocum testify that those flanges were parallel—

The COURT.—Do you claim you can obtain a monopoly by patent on the form of a letter?

Mr. GRIFFIN.—Why, certainly, you can obtain a patent on the form of a letter. It would depend entirely on whether the form was patentable.

(Deposition of Tracy W. Simpson.)

There are any number of design patents on letter forms.

The COURT.—I realize that, but you see letters every place, in print and in signs, in every conceivable form. Do you claim that it is a subject of a patent, whether you call it a design patent, or any other kind of patent? It seems to me you might as well try to claim a patent on the alphabet, itself.

Mr. GRIFFIN.—We are not claiming anything of that kind. We are claiming a combination here with a series of elements.

The COURT.—Proceed with the examination.

Mr. GRIFFIN.—Q. You heard Mr Slocum testify that this sign had flanges at the outside of the channels parallel to the face of the sign body.

A. No, sir, I didn't hear him testify to that.

Q. You did not? A. No, sir.

Q. Did you ever see this sign?

A. Yes, many times.

Q. How close were you to it?

A. I have been on the sidewalk, directly beneath the sign.

Q. And that is a matter of twenty feet from the sign, isn't it, or more? A. Yes.

Q. And at that distance you could not tell whether it was parallel to the sign body, or not?

A. Yes, I could tell; those flanges are slightly beveled.

Mr. TOWNSEND.—Do you claim, Mr. Griffin,

(Deposition of Tracy W. Simpson.)

that that Oregon Hotel sign is an infringement?
[256]

Mr. GRIFFIN.—No. I claim that that is not an anticipation. The only thing that that Oregon Hotel sign is put into the record for is to show anticipation. I claim that that is not an anticipation of anything that is claimed in this case.

Q. Referring again to the Little patent, in Figure 2 of the Little patent, there is nothing in Figure 2, nor in the specifications, that would indicate that the face of that sign was in any way raised?

A. Yes, there is .

The COURT.—You can make up your own record, but these questions, to my mind, are utterly and absolutely immaterial. I don't think the form of a letter in an electrical sign differs from the form of a letter used elsewhere. I say you can make up your own record, so you will have it before an Appellate Court.

A. (Continuing.) That portion of Figure 2 in the Little Patent illustrated as "B," which is the metallic letter, as referred to in the patent description from lines 55 on, has definite thickness; it is plainly shown in Figure 2 as being cross-hatched, and, therefore, it has definite thickness, and it is plainly shown as being flanged outwardly on the face of the body of the sign. If one skilled in the art came to produce this sign at the present date, after the lapse of some 60 or 70 years, he would, instead of using wood for the background, use metal, and, in order to save weight, make it

(Deposition of Tracy W. Simpson.)

thinner. It is simply a question of degree, as to whether at the present time we would make the background relatively thin relative to the border.

Q. That is entirely your opinion on the matter, but there is nothing in the specifications to indicate that?

A. Yes, there is something in the specifications to indicate that; that portion of the specifications from line 55 to 65 explains that.

Q. What is the explanation?

A. It says: "The letters may each be made of metal cast with these beveled edges, and with flanges projecting from their flaring edges." It is that expression, "with flanges projecting from their flaring edges"—those flanges [257] must have thickness. They lie on the body of the sign; therefore, they are raised up from the body of the sign.

Q. But there is nothing said in the specifications about their being raised from the body of the sign?

A. But one would naturally infer that, from the fact that they are flanges projecting from the flaring edges. They could not be otherwise. They are plainly shown in the drawing as being cross-hatched.

Q. Further on in your affidavit, you say that certain municipalities have prohibited the use of glass in electric signs, where the body of the sign was made of glass. Would not that same difficulty be present in a sign made of the character

(Deposition of Tracy W. Simpson.)

of the flange patent, and would not that be a defect in that sign?

A. May I see the affidavit, please? I would like to see exactly what I did say.

Q. Will you read the question to the witness, Mr. Reporter?

(Question read by the reporter.)

A. My inspection of the affidavit does not show that I stated that the body of the sign was made of glass.

Q. Your affidavit says: "Within my experience I have known of municipalities which passed ordinances prohibiting the use of glass in electric signs of this character on account of the danger of breakage, and the likelihood of injury to pedestrians passing underneath." A. Yes.

Q. Would not that be a defect of this Boldes sign where the sign body is made of glass?

A. I don't understand that in the Boldes sign the entire sign body is made of glass, only that portion on the face of the sign behind the letters. A great portion of the sign made under that patent may be made of metal. By following the specifications of Boldes, by adopting any means of making the flange opaque, one could easily place sheet metal over that front and make it opaque.

Q. However, nothing of that kind is said in the patent? [258]

A. No, sir; that last phrase of mine is what one would naturally presume who was skilled in the art.

(Deposition of Tracy W. Simpson.)

Mr. GRIFFIN.—I move that the last part of the answer be stricken out as not responsive.

The COURT.—Denied.

Mr. GRIFFIN.—Q. With respect to the Prismatic Sign Company's signs, in Denver, Colorado you had no personal knowledge with respect to those signs, at all, had you? A. Yes.

Q. When did you first see them?

The COURT.—You mean he had no knowledge of them prior to the date of the application?

Mr. GRIFFIN.—Yes. A. In the year 1912.

Q. Mr. Mackenzie, who was a witness, states that such signs were not made until later than that; so it was not such a sign as is illustrated here that you saw?

Mr. TOWNSEND.—What is the warrant for that statement, Mr. Griffin? You are endeavoring to convey to the Court how to interpret Mr. Mackenzie's testimony.

The COURT.—I don't remember about the testimony of the other witness. You understand the question, do you not? A. Surely.

The COURT.—Answer it.

A. The question is misleading, because Mackenzie did testify—

The COURT.—I don't care what he testified to.

Mr. GRIFFIN.—I will withdraw the question.

Q. It was not such a sign with a raised molding as this, that you saw in 1912?

A. Yes, I was in Denver in 1912.

Q. Where did you see the sign?

(Deposition of Tracy W. Simpson.)

A. I don't recall the exact location where I saw those signs in Denver. I knew that that type of sign was erected, and I saw them in various places.

Q. How many?

A. Enough to know that that was a type of sign existing in Denver. I was in Denver in connection with a tour of various cities, looking in to various electrical matters, [259] of which signs was one.

Q. How do you fix the date as being in 1912?

A. Because Mrs. Simpson and I spent that summer in Estes Park, just north of Denver.

Q. In your affidavit you say concerning other signs: "In connection with such separate set of lights, it has long been the practice to provide a reflector which will direct the rays therein downwardly to the sidewalk"; how long have you known of such construction?

A. I cannot say as to that.

Q. You never saw anything of that kind, did you, prior to either one of the applications for a patent herein, to wit, October 19, 1914?

The COURT.—Do you claim a monopoly on the right to use a reflector to turn light down?

Mr. GRIFFIN.—The witness says here, in connection with his affidavit, and I am only seeking to cover what is claimed by the two patents, this particular claim describes the location for the lights handling the sign, and also the lights for illuminating the sidewalk.

The COURT.—Proceed.

A. I have seen such signs, particularly in Seattle.

(Deposition of Tracy W. Simpson.)

Mr. GRIFFIN.—Q. When?

A. Since I came with the Federal Company, on the Pacific Coast.

Q. That was later than October 19, 1914?

A. Yes.

Q. With respect to this sign that you made over in Oakland for the Haberdasher, and the clothing sign, carrying three letters, is it not a fact that the lower line of letters is only about four inches from the bottom of the sign?

A. As I previously testified, I am not familiar with the exact height, but I know the height it has above the top of the reflector underneath.

Q. You know that the reflectors are about 6 inches deep, don't [260] you?

A. I don't know that; I would say that generally they were about that.

Q. Then you could not testify that no light from those reflectors could go through those letters at all?

A. I can testify that no light from the top of the reflectors could possibly go through those letters, as I previously stated at yesterday's session.

Q. You just said you could not testify as to how far up they were, and you didn't know exactly the height of the letters from the bottom line; how can you testify there will be no light from those reflectors pass through the letters?

A. You have asked me to give a dimension in two ways; to give it by the difference, first measuring upward from the bottom line of the sign to the lower edge of the letters, and then measuring

(Deposition of Tracy W. Simpson.)

upwardly from the lower line of the sign to the top of the reflectors. I say to you I don't know either of those dimensions, but I do know the distance from the top of the reflector to the bottom line of letters, and the distance upward is from one-half to three-quarters of an inch. The distance from the apron downward may be five inches, ten inches, or two feet—it is immaterial.

Mr. GRIFFIN.—That is all.

Mr. TOWNSEND.—I want to offer in evidence the drawing referred to by the witness, and ask that it be marked Defendants' Exhibit "II."

(The drawing was here marked Defendants' Exhibit "II.")

Mr. GRIFFIN.—If your Honor please, I have prepared an amendment in accordance with the facts as brought out by the witness here, naming the Federal Electric Company, a California corporation, as the defendant, and I will ask to have the amendment entered and service of process either admitted or made at this time. The present witness has testified that he is the president and general manager of the Federal Electric Company. [261] I might say that the allegations of the original complaint were sufficient to meet this amendment, because it was alleged there as to the difficulty of ascertaining the exact company making the signs, and also the difficulty in ascertaining the several different companies dealing with the owners of the signs.

Mr. TOWNSEND.—This is the proposed

amended bill of complaint in which you sue only the Federal Electric Company as sole defendant?

Mr. GRIFFIN.—Yes.

Mr. TOWNSEND.—We see no objection to the amendment, your Honor. We want to get this case disposed of. It is the same, one way, as the other.

The COURT.—I can see no formal objection to it, myself. Anything further?

Mr. GRIFFIN.—That is all. If your Honor please, I would much prefer to submit this case on briefs.

The COURT.—No, I am going to dispose of it this morning. Anything you have to say you can say orally. In order to have the record complete I suppose it should be stipulated that the answer may stand as the answer to the amended complaint.

Mr. TOWNSEND.—Yes, I should have stated that.

Mr. GRIFFIN.—That is satisfactory.

(After argument by counsel.)

The COURT.—The claim that a person in this day and age can gain a monopoly on the right to use raised letters in an electric sign, or upon the mere mode employed to throw rays of light from such sign upon a sidewalk, is, to my mind, utterly unfounded.

The complaints in both cases are, therefore, dismissed. [262]

The attached statement of the evidence in the above-entitled case is hereby approved.

FRANK H. RUDKIN,

District Judge.

Jan. —, 1922.

[Endorsed]: Filed Jan. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [263]

In the United States District Court, in and for the Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California Corporation,

Defendant.

Petition for Appeal and Order Allowing Same.

To the Honorable District Court of the United States, in and for the Southern Division of the Northern District of California, Ninth Circuit.

Now comes Joseph Hotchner, plaintiff in the above-entitled action, and feeling himself aggrieved by the dismissal of his complaint by this Court entered on the 9th day of Dec., 1921, hereby prays that an appeal may be allowed to him from said decree of dismissal to the United States Circuit Court of Appeals in and for the Ninth Circuit, and in con-

nection with this petition herewith presents his assignment of errors.

Your petitioner therefore prays that an order allowing said appeal be made, and that an order fixing the amount of the bond for costs be made upon the allowance of this appeal.

CARLOS P. GRIFFIN,
Attorney for Plaintiff.

The above appeal is hereby allowed.

FRANK H. RUDKIN,
Judge.

San Francisco, Calif., December 27, 1921.

Receipt of a copy of the within appeal petition is hereby admitted this 27th day of Dec., 1921.

CHAS. E. TOWNSEND,
WM. A. LOFTUS,
Attys. for Defendant.

[Endorsed]: Filed Dec. 28, 1921. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[264]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation,

Defendant.

Assignment of Errors.

Now comes the plaintiff Joseph Hotchner, by his attorney, and in connection with his appeal says the Honorable District Court erred in dismissing the complaint herein as follows:

1. In holding that patent No. 1,259,237 is void when only claim 4 was in issue in said action.

2. In holding that patent No. 1,315,187 is void when only claims 1, 2 and 3 were in issue herein.

3. In holding that claim 4 of patent No. 1,259,237 is void.

4. In holding that claims 1, 2 and 3 of Patent No. 1,315,187 are void.

5. In holding that even if said patents are valid that neither of them are infringed.

6. In holding that combination claims are void because their several elements may be found separately in the prior art.

7. In holding that any patent in the record negatives the patentable novelty of the claims in issue in either patent herein.

8. In holding that any public use of a sign alleged to have anticipated the claims of either or both patents was sufficient but had to be proven.

9. In holding that any public use of any sign offered in evidence herein was an anticipation of any claim in issue in either patent.

10. In making the following decision: "The Claim that a [265] person in this day and age can gain a monopoly on the right to use raised letters in an electric sign, or upon the mere mode em-

ployed to throw rays of light from such sign upon a sidewalk is to my mind utterly unfounded. The complaint in both cases are therefore dismissed.”

11. In dismissing the complaint at the cost of plaintiff.

12. In not holding both of said patents valid and infringed.

CARLOS P. GRIFFIN,
Attorney for Plaintiff.

San Francisco, Calif., December 27, 1921.

Receipt of a copy of the within assignment of errors is hereby admitted this 27th day of Dec., 1921.

CHAS. E. TOWNSEND,
WM. A. LOFTUS,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 28, 1921. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[266]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation.

Defendant.

Order Fixing Cost Bond.

In the above-entitled cause the plaintiff having filed his petition for an order allowing an appeal together with an assignment of errors.

Now, therefore, upon motion of Carlos P. Griffin, solicitor for plaintiff, and said appeal having been heretofore allowed from the decree dismissing the complaint in the above-entitled case, it is hereby ordered that the amount of plaintiff's cost bond upon said appeal be, and the same is hereby fixed in the sum of One Thousand (\$1000) Dollars.

It is further ordered that upon the giving of such bond approved by the Court that a certified copy of the transcript of the records and proceedings herein as submitted by the parties and approved by the Court may be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

FRANK H. RUDKIN,
District Judge.

San Francisco, Calif., Dec. 27, 1921.

Receipt of a copy of the within order fixing cost bond is hereby admitted this 27th day of Dec., 1921.

CHAS. E. TOWNSEND,
WM. A. LOFTUS,
Attorneys for Defendant. [267]

[Endorsed]: Filed Dec. 28, 1921. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[268]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation,

Defendant.

Bond on Appeal of Joseph Hotchner.

KNOW ALL MEN BY THESE PRESENTS:
That National Surety Company, a corporation duly
licensed to transact a suretyship business in the
State of California, is HELD AND FIRMLY
BOUND in the penal sum of One Thousand
(\$1,000) Dollars, to be paid to the Federal Electric
Company, its successors or assigns, for which pay-
ment, well and truly to be made, the National Surety
Company binds itself, its successors and assigns,
firmly by these presents.

The conditions of the foregoing bond is such that

WHEREAS, the said Joseph Hotchner, plaintiff
in the above-entitled suit, has taken an appeal to the
United States Circuit Court of Appeals for the
Ninth Circuit, to reverse a decree made and en-
tered on the 9th day of December, 1921, by the Dis-
trict Court of the United States in and for the
Northern District of California, Second Division,
in the above-entitled suit, wherein the complaint is
dismissed with costs.

NOW, THEREFORE, the condition of the foregoing obligation is such that if said Joseph Hotchner shall prosecute his said appeal to effect and shall answer all damages and costs, if he shall fail to make his plea good, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said National Surety Company has caused this obligation to be signed by its duly authorized [269] officers at San Francisco, California, and its corporate seal to be hereunto affixed, this 28th day of December A. D. 1921.

[Seal] NATIONAL SURETY COMPANY.

By F. J. CRISP,

Resident Vice-president.

By A. C. ROBESON,

Resident Asst. Secretary.

The premium charged for this bond is \$10.00 per annum.

Approved:

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed Dec. 28, 1921. W. B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[270]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation.

Defendant.

**Stipulation for Record on Appeal and Hearing of
Appeal.**

The above case having been consolidated, heard, tried and determined at the same time upon the same testimony, evidence, proofs and records with the case of Joseph Hotchner vs. R. E. Morgan and P. C. Long, in Equity No. 507, and

WHEREAS, in the opinion of the parties hereto, the transcript of the record on appeal should embody substantially the entire record of proceedings and testimony in the words of the respective witnesses, evidence taken, adduced or introduced during the trial of said cases,

NOW, THEREFORE, subject to the approval of the Court, it is hereby stipulated and agreed between counsel for the respective parties, as follows:

1. That the appeals taken by the plaintiff in both of the above-entitled cases to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of dismissal, heretofore made and entered in said cases, may and shall be heard upon one and the same transcript of record.

2. Said transcript of record on appeal shall include the statement of the testimony herewith submitted to the Clerk, for the approval of the Trial Judge and for certification to the [271] Clerk of the Court of Appeals.

CARLOS P. GRIFFIN,
Attorney for Plaintiff.

CHAS. E. TOWNSEND,
Attorney for Defendant.

Dated January 19, 1922.

[Endorsed]: Filed Jan. 28, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[272]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

Petition for Appeal and Order Allowing Same.

To the Honorable District Court of the United
States, in and for the Southern Division of the
Northern District of California, Ninth Circuit.

Now comes Joseph Hotchner, plaintiff in the
above-entitled action and feeling himself aggrieved
by the dismissal of his complaint by this Court en-
tered on the 9th day of Dec., 1921, hereby prays
that an appeal may be allowed to him from said

decree of dismissal to the United States Circuit Court of Appeals in and for the Ninth Circuit, and in connection with this petition herewith presents his assignment of errors.

Your petitioner therefore prays that an order allowing said appeal be made, and that an order fixing the amount of the bond for costs be made upon the allowance of this appeal.

CARLOS P. GRIFFIN,

Attorney for Plaintiff.

The above appeal is hereby allowed.

FRANK H. RUDKIN,

Judge.

San Francisco, Calif., December 27, 1921.

Receipt of a copy of the within appeal petition is hereby admitted this 27th day of Dec., 1921.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for Defendants.

[Endorsed]: Filed Dec. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[273]

In the United States District Court, in and for the Ninth Circuit, Northern District of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

Assignment of Errors.

Now comes the plaintiff Joseph Hotchner, by his attorney, and in connection with his appeal says the Honorable District Court erred in dismissing the complaint herein as follows:

(1) In holding that Patent No. 1,259,237 is void when only claim 4 was in issue in said action.

(2) In holding that claim 4 of Patent No. 1,259,237 is void.

(3) In holding that even if said patent is valid, it is not infringed.

(4) In holding that combination claims are void because their several elements may be found separately in the prior art.

(5) In holding that any patent in the record negatives the patentable novelty of the claim in issue in the patent herein.

(6) In holding that any public use of a sign alleged to have anticipated the claim of the patent herein was sufficient but had to be proven.

(7) In holding that any public use of any sign offered in evidence herein was an anticipation of the claim in issue in the patent. [274]

(8) In making the following decision: "The claim that a person in this day and age can gain a monopoly on the right to use raised letters in an electric sign, or upon the mere mode employed to throw rays of light from such sign upon a sidewalk is to my mind utterly unfounded. The complaints in both cases are therefore dismissed."

(9) In dismissing the complaint at the cost of plaintiff.

(10) In not holding said patent valid and infringed.

CARLOS P. GRIFFIN,
Attorney for Plaintiff.

San Francisco, Calif., December 27, 1921.

Receipt of a copy of the within assignment of errors is hereby admitted this 27th day of Dec., 1921.

CHAS. E. TOWNSEND,
WM. A. LOFTUS,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [275]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

Order Fixing Cost Bond.

In the above-entitled cause the plaintiff having

filed his petition for an order allowing an appeal together with an assignment of errors.

Now, therefore, upon motion of Carlos P. Griffin, solicitor for plaintiff, and said appeal having been heretofore allowed from the decree dismissing the complaint in the above-entitled case, it is hereby ordered that the amount of plaintiff's cost bond upon said appeal be, and the same is hereby fixed in the sum of Five Hundred (\$500) Dollars.

It is further ORDERED that upon the giving of such a bond approved by the Court that a certified copy of the transcript of the records and proceedings herein as submitted by the parties and approved by the Court may be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

FRANK H. RUDKIN,
District Judge.

San Francisco, Calif., December 27, 1921.

Receipt of a copy of the within Order Fixing Cost Bond is hereby admitted this 27th day of December, 1921.

CHAS. E. TOWNSEND,
WM. A. LOFTUS,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[276]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

MORGAN and LONG,

Defendants.

Bond on Appeal of Joseph Hotchner.

KNOW ALL MEN BY THESE PRESENTS:

That National Surety Company, a corporation duly licensed to transact a suretyship business in the State of California, is **HELD AND FIRMLY BOUND** in the penal sum of Five Hundred (\$500.00) Dollars, to be paid to Morgan and Long, their successors or assigns, for which payment, well and truly to be made, the National Surety Company bind itself its successors and assigns, firmly by these presents.

The condition of the foregoing bond is such that

WHEREAS, the said Joseph Hotchner, plaintiff in the above-entitled suit, has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree made and entered on the 9th day of December, 1921, by the District Court of the United States in and for the Northern District of California, Second Division, in the above-entitled suit, wherein the complaint is dismissed with costs.

NOW, THEREFORE, the condition of the foregoing obligation is such that if said Joseph Hotchner shall prosecute his said appeal to effect and shall answer all damages and costs, if he shall fail to make his plea good, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said National Surety Company has caused this obligation to be signed by its duly authorized officers at San Francisco, California, and its corporate [277] seal to be hereunto affixed, this 28th day of December, A. D. 1921.

[Seal] NATIONAL SURETY COMPANY.

By F. J. CRISP,

Resident Vice-president.

By A. C. ROBESON,

Resident Asst. Secretary.

The premium charged for this bond is \$10.00 per annum.

Approved.

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed Dec. 28, 1921. W. B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[278]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

**Stipulation for Record on Appeal and Hearing of
Appeal.**

The above case having been consolidated, heard, tried and determined at the same time upon the same testimony, evidence, proofs and records with the case of Joseph Hotchner vs. Federal Electric Company, a California corporation, In Equity—No. 577, and

WHEREAS, in the opinion of the parties hereto, the transcript of the record on appeal should embody substantially the entire record of proceedings and testimony in the words of the respective witnesses, evidence taken, adduced or introduced during the trial of said cases,—

NOW, THEREFORE, subject to the approval of the Court it is hereby stipulated and agreed between counsel for the respective parties, as follows:

1. That the appeals taken by the plaintiff in both of the above-entitled cases to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of dismissal, heretofore made and en-

tered in said cases, may and shall be heard upon one and the same transcript of record.

2. Said transcript of record on appeal shall include the statement of the testimony herewith submitted to the Clerk, for the approval of the Trial Judge and for certification [279] to the Clerk of the Court of Appeals.

CARLOS P. GRIFFIN,
Attorney for Plaintiff.

CHAS. E. TOWNSEND,
Attorney for Defendants.

Dated January 19, 1922.

[Endorsed]: Filed Jan. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[280]

In the United States District Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation,

Defendant.

Praeceptum for Transcript of Record.

Please incorporate in the record on appeal herein the following documents and entries:

1. The docket entries.

2. The amended bill of complaint in Case No. 577 and the complaint in Case No. 507.

3. The answer in each case.

4. The stipulation statement of the testimony.

5. The stipulation concerning the hearing of the cases of Joseph Hotchner vs. Federal Electric Company No. 577, and against R. E. Morgan and P. C. Long No. 507 upon one printed record.

6. The decision of the Judge.

7. The decree of dismissal in both cases.

8. The appeal petition and notice thereof.

9. The assignment of errors.

10. The order fixing the amount of the appeal bond, but which bond need not be printed.

11. The citation on appeal.

CARLOS P. GRIFFIN,
Attorney for Plaintiff.

Dated January 19, 1922.

Receipt of a copy of the within praecipe is hereby
[281] admitted this 19th day of Jan., 1922.

CHAS. E. TOWNSEND,
Attorney for Deft.

[Endorsed]: Filed Jan. 19, 1922. W. B. Mal-
in, Clerk. By J. A. Schaertzer, Deputy Clerk.
[282]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California Corporation,

Defendant.

and

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN et al.,

Defendants.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing two hundred eighty-two (282) pages, numbered from 1 to 282, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled suits, as enumerated in the praecipe for record on appeal, as the same remains of record and on file in the office of the clerk of said court,

and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$125.40; that said amount was paid by the plaintiff; and that the original citations issued in said suits are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of March, A. D. 1922.

[Seal]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

By J. A. Schaertzer. [283]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Federal Electric Company, a California Corporation,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein JOSEPH HOTCHNER, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, holding the United States District Court, for the Northern District of California, this 28th day of December, A. D. 1921.

FRANK H. RUDKIN,
United States District Judge. [284]

Service of a copy of the within Citation on Appeal is hereby admitted this 19th day of January, 1922.

CHAS. E. TOWNSEND,
Attorney for Defendant.

[Endorsed]: No. 577. United States District Court for the Northern District of California. Joseph Hotchner, Appellant, vs. Federal Electric Company, a California Corporation. Citation on Appeal. Filed Jan. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.
The President of the United States, to R. E. Morgan and P. C. Long, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an

order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein JOSEPH HOTCHNER is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, holding the United States District Court, for the Northern District of California this 28th day of December, A. D. 1921.

FRANK H. RUDKIN,

United States District Judge. [285]

Service of a copy of the within Citation on Appeal is hereby admitted this 19th day of January, 1922.

CHAS. E. TOWNSEND,

Attorney for Defendant.

[Endorsed]: No. 507. United States District Court for the Northern District of California. Joseph Hotchner, Appellant, vs. R. E. Morgan and P. C. Long. Citation on Appeal. Filed Jan. 19, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Hotchner, Appellant, vs. Federal Electric Company,

a California Corporation, Appellee, and Joseph Hotchner, Appellant, vs. R. E. Morgan and P. C. Long, Appellees. Transcript of Record. Upon Appeals from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Received March 15, 1922.

F. D. MONCKTON,
Clerk.

Filed April 6, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court, in and for the Ninth Circuit, Northern District of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

Order Extending Time to and Including February 28, 1922, to File Record and Docket Cause.

Good cause appearing therefor, it is ordered that plaintiff be given to and including February 28th,

1922, within which to file the record in the above-entitled case.

WM. W. MORROW,
Circuit Judge.

Dated January 27, 1922.

In the United States Circuit Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

Affidavit of Carlos P. Griffin.

State of California,
City and County of San Francisco.

Carlos P. Griffin, being duly sworn, deposes and says that he is the attorney for plaintiff in the above-entitled case; that he has prepared and filed with the clerk all of the necessary documents to perfect the appeal in the above-entitled case, but that owing to the fact that Judge Rudkin, who tried the case, has left this jurisdiction, it was necessary to send the statement of evidence to him for his signature, but that the same has not been returned to the clerk of this court at the present time.

CARLOS P. GRIFFIN,
Attorney for Plaintiff.

Dated January 27, 1922.

Subscribed and sworn to before me this 27th day of January, 1922.

[Seal]

JOHN L. MURPHY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 507. In the U. S. Circuit Court, State of California, County of San Francisco. Joseph Hotchner, Plaintiff, vs. R. E. Morgan and P. C. Long, Defendants. Order Extending Time. Filed Jan. 27, 1922. F. D. Monckton, Clerk. Re-filed April 6, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court, in and for the Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California Corporation,

Defendant.

Order Extending Time to and Including February 28, 1922, to File Record and Docket Cause.

Good cause appearing therefor, it is ordered that plaintiff be given to and including February 28th, 1922, within which to file the record in the above-entitled case.

WM. W. MORROW,

Circuit Judge.

San Francisco, Calif., January 27, 1922. 

In the United States Circuit Court, in and for the
Ninth Circuit, Northern District of California.

IN EQUITY—No. 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation,

Defendant.

Affidavit of Carlos P. Griffin.

State of California,

City and County of San Francisco,—ss.

Carlos P. Griffin, being duly sworn, deposes and says that he is the attorney for plaintiff in the above-entitled case; that he has prepared and filed with the clerk all of the necessary documents to perfect the appeal in the above-entitled case, but that owing to the fact that Judge Rudkin, who tried the case, has left this jurisdiction, it was necessary to send the statement of evidence to him for his signature, but that the same has not been returned to the clerk of this court at the present time.

Dated January 27, 1922.

CARLOS P. GRIFFIN,

Attorney for Plaintiff.

Subscribed and sworn to before me this 27th day of January, 1922.

[Seal]

JOHN L. MURPHY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 577. In the U. S. Circuit Court, State of California, County of San Francisco, Joseph Hotchner, Plaintiff, vs. Federal Electric Company, a California Corporation, Defendant. Order Extending Time.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 27, 1922. F. D. Monckton, Clerk. Re-field Apr. 6, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit, Northern District of California.

IN EQUITY—Nos. 507 and 577.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

Order Extending Time to and Including April 28, 1922, to File Record and Docket Cause.

Upon the annexed affidavit it is hereby ordered that plaintiff have to and including April 28th,

1922, within which to file the printed record in the above-entitled case.

WM. W. MORROW,
Circuit Judge.

Dated San Francisco, Calif., February 27, 1922.

In the United States Circuit Court of Appeals, in
and for the Ninth Circuit, Northern District
of California.

IN EQUITY—No. 507.

JOSEPH HOTCHNER,

Plaintiff,

vs.

R. E. MORGAN and P. C. LONG,

Defendants.

Affidavit of Carlos P. Griffin.

State of California,

City and County of San Francisco,—ss.

Carlos P. Griffin, being duly sworn, deposes and says that he has diligently endeavored to obtain the necessary printed copies of patents for use in preparing the printed record in the above-entitled case, but that he is advised by the Patent Office that over two hundred copies are out of print at the present time, and that they will be reprinted by the Patent Office in about five weeks.

CARLOS P. GRIFFIN,
Attorney for Plaintiff.

Dated February 27, 1922.

Subscribed and sworn to before me, a notary public, this 27th day of February, 1922.

[Seal]

CHAS. T. STANLEY,

Notary public in and for the City and County of San Francisco, State of California.

[Endorsed]: (Original.) No. 507. In the Circuit Court of Appeals, 9th Circuit, State of California, County of San Francisco. Joseph Hotchner, Plaintiff, vs. R. E. Morgan and P. C. Long, Defendants. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including April 28, 1922, to File Record and Docket Cause. Filed Feb. 27. 1922. F. D. Monckton, Clerk. Re-filed Apr. 6, 1922. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 1.

No. 1259237.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come.

WHEREAS**JOSEPH HOTCHNER,**

of

San Francisco, California,

has presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in

ILLUMINATED SIGNS,

a description of which invention is contained in the specifications of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided, and

WHEREAS upon due examination made the said claimant is adjudged to be justly entitled to a patent under the law.

Now therefore these Letters Patent are to grant unto the said Joseph Hotchner, his heirs or assigns for the term of seventeen years from the twelfth day of March, one thousand nine hundred and eighteen, the exclusive right to make, use and vend the said invention throughout the United States and the territories thereof.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this twelfth

day of March, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-second.

[Seal]

R. F. WHITEHEAD,
Acting Commissioner of Patents.

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 1. Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

1,259,237.

Patented Mar. 12, 1918.

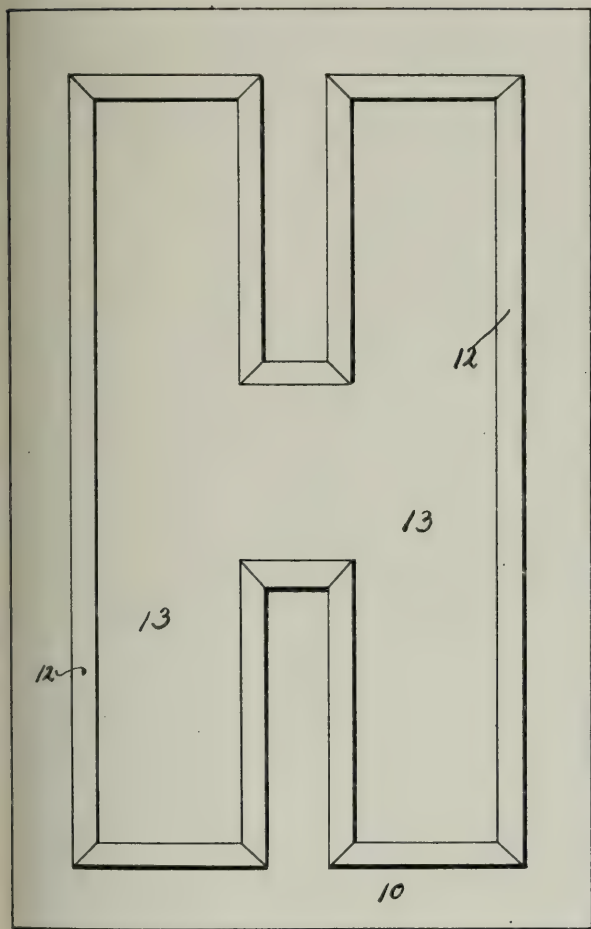


FIG. 1.

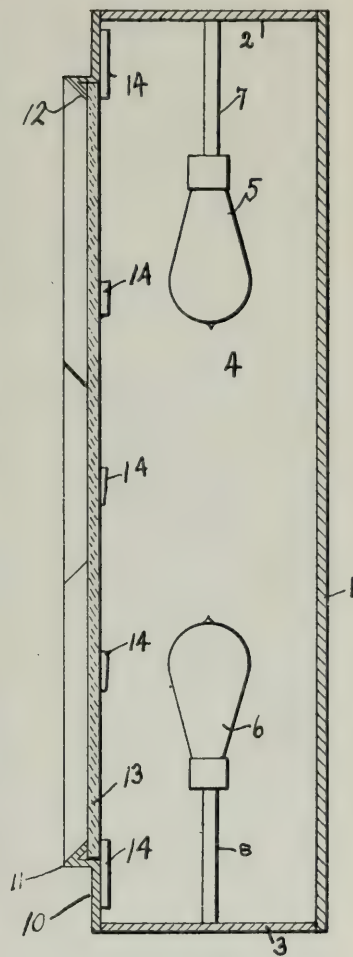


FIG. 2.

FIG. 3.

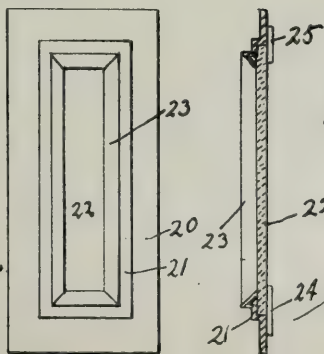


FIG. 4.

WITNESSES:

A. H. Kephart.
H. E. Heumann

INVENTOR.

J. Hotchner

BY

Carlos P. Griffin
ATTORNEY.

JOSEPH HOTCHNER, OF SAN FRANCISCO, CALIFORNIA.

ILLUMINATED SIGN.

1,259,237.

Specification of Letters Patent.

Patented Mar. 12, 1918.

Application filed October 19, 1914. Serial No. 557,413.

To all whom it may concern:

Be it known that I, JOSEPH HOTCHNER, a citizen of the United States, residing at San Francisco, in the county of San Francisco, State of California, have invented new and useful Illuminated Signs, of which the following is a specification in such full and clear terms as will enable those skilled in the art to construct and use the same.

10 This invention relates to illuminated signs and its object is to produce a sign which gives the appearance of an ornamental sign by day as well as a good effect at night when illuminated.

15 Another object of the invention is to produce a sheet metal letter having a translucent backing through which the light can pass for night illumination which backing is easily removable for cleaning, or which
20 may be easily renewed when injured.

An embodiment of the invention is shown in the drawing in which the same reference numeral is applied to the same portion throughout, but I am aware that there are
25 many modifications thereof.

Figure 1 is a front view of a letter constructed in accordance with this invention.

Fig. 2 is a vertical sectional view of the letter showing the interior construction of
30 the sign.

Fig. 3 is a front elevation of a modified form of the letter, and

Fig. 4 is a vertical sectional view of the modified form of letter shown in Fig. 3.

35 The numeral 1 indicates the sign back, 2 the top, 3 the bottom and 4 the end of a box making up a complete sign with a single letter, although it will be understood by those skilled in the art that as many letters
40 may be assembled on one back as is desired, but the letter construction is the important feature of the present case. Lamps 5 and 6 are suitably supported on rods 7 and 8 in a suitable position within the sign to illuminate the letter.
45

The front or body of the sign is indicated at 10 and consists of sheet metal pressed outwardly at 11 to produce a molding having an outwardly flared surface at 12, which
50 molding will have the shape of the desired letter. This molding is pressed outwardly far enough so that a suitable sheet of translucent material 13 may be inserted under the molding and is held in place in the
55 plane of the sheet metal front 10 by strips of sheet metal 14, soldered or otherwise se-

cured to the inside of the front 10. Said strips of metal are secured to the inside of the front and may be straightened up against the translucent material to hold it
60 in place against the underside of the molding when the sign is put together. The sheet of translucent material is not cut out the shape of the letter but covers the entire area defined by the length and breadth of
65 the letter or character. By thus making the sheet of translucent material cover the entire outer area of the character without conforming to the outline of the letter, the cost of manufacture is reduced while the
70 structure is actually stronger.

In Figs. 3 and 4 there is illustrated a modified form of the invention in which the numeral 20 represents the letter plate. This letter plate is raised at 21 entirely around
75 the letter the thickness of the translucent or transparent plate 22, which is inserted therein under the letter while the edges of the letter have the raised bevel therearound as indicated at 23. Clips 24 and 25 soldered
80 to the back of the letter plate hold the translucent plate 22 in place.

An advantage of the construction here shown is that substantially all of the letters have given sizes so that when a replacement
85 is desired the translucent plate may be cut to the precise size of the letter in which the replacement is desired to be made.

The clips are put on before the glass is assembled, after which the clips are straightened out so they bear on the glass as shown
90 in Figs. 2 and 4.

Having thus described my invention what I claim as new and desire to secure by Letters Patent of the United States, is as follows, modifications within the scope of the claims being expressly reserved:

1. A sign comprising a box-like structure having a front formed of a sheet metal body having an outline molding pressed therefrom to define a character, a sheet of translucent material lying in the plane of the sheet metal front in back of the character, clips to hold the translucent material in place, and means within the structure to
105 illuminate the translucent material.

2. A sign comprising a box-like structure having a front formed of a sheet metal body having a raised portion pressed therefrom to form an outline molding defining a character, a sheet of translucent material lying in the plane of said metal front in back of
110

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the character, clips to hold the translucent material in place, and means within the structure to illuminate the translucent material.

5 3. A sign comprising a box-like structure having a front formed of a sheet metal body having a raised outline molding pressed therefrom to define a character, said molding forming an outwardly flaring bevel, a
10 sheet of translucent material lying substantially in the plane of the metal front in back of the character, clips to hold the translucent material in place, and means within
15 the structure to illuminate the translucent material.

4. A sign comprising a sheet metal body with a raised molding formed therein to de-

fine a character, a sheet of translucent material covering the entire area of the space bounded by the greatest length and breadth of the letter back of the same, the edges of the molding toward the center of the elements of the letter lying substantially in contact with the translucent material, and means to illuminate the translucent material
20 and through which the light shines. 25

In testimony whereof I have hereunto set my hand this 15th day of September, A. D. 1914, in the presence of the two subscribed witnesses.

JOSEPH HOTCHNER.

Witnesses:

C. P. GRIFFIN,
L. H. ANDERSON.

Plaintiff's Exhibit No. 2.

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 2. Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

1,315,187.

Patented Sept. 2, 1919.

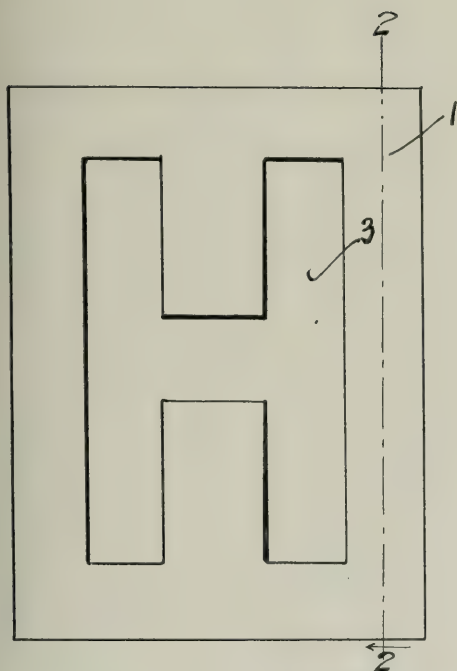


Fig. 1

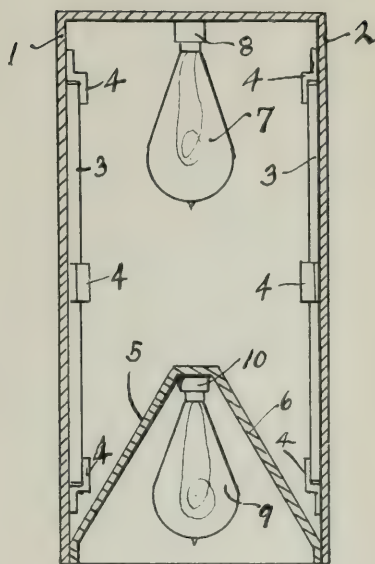


Fig. 2.

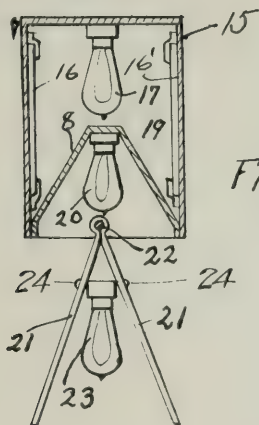


Fig. 3

WITNESSES:

A. H. Kephart,
Bachford Smith

INVENTOR.

J. Hotchner.

BY

Carlos P. Griffin
ATTORNEY

JOSEPH HOTCHNER, OF SAN FRANCISCO, CALIFORNIA.

ILLUMINATED SIGN.

1,315,187.

Specification of Letters Patent.

Patented Sept. 2, 1919.

Application filed October 19, 1914. Serial No. 947,414.

To all whom it may concern:

Be it known that I, JOSEPH HOTCHNER, a citizen of the United States, residing at San Francisco, in the county of San Francisco, State of California, have invented a new and useful Illuminated Sign, of which the following is a specification in such full and clear terms as will enable those skilled in the art to construct and use the same.

10 This invention relates to an illuminated sign of the type known as a transparency and its object is to provide means whereby the sidewalk and store front may be adequately illuminated, without at the same 15 time destroying the effect of the sign.

It will be understood by those skilled in the art that transparencies are not as brightly illuminated as signs having outside lights, so that if outside lights are used to 20 illuminate the sidewalk they kill the effect of the transparency. Therefore, in order to effectually illuminate the sidewalk it becomes necessary to conceal the sidewalk lights from the person looking at the sign 25 from a distance.

Another object of the invention is to make a double use of the reflector used in such signs, one side reflecting the light through the letters while the other side reflects the 30 light to the street from other lamps.

An embodiment of the invention is shown in the drawing in which the same reference numeral is applied to the same portion throughout, but I am aware that there are 35 many modifications thereof.

Figure 1 is a front elevation of a letter constructed in accordance with this invention.

Fig. 2 is a vertical sectional view of the 40 letter on the line 2-2 Fig. 1 looking in the direction of the arrow.

Fig. 3 is a view in section of a modified form of the invention in which a secondary sign is suspended from the first sign.

45 The numeral 1 represents one side of a box sign body and 2 the opposite side thereof, said body being commonly constructed of sheet metal. The letter is cut out of the metal sides and a plate of translucent material 3 is placed in position inside the sign 50 body, clips 4 secured to the inside of the sign body holding the plates in place.

Connected with the bottom of the side pieces are two reflectors 5 and 6 which direct 55 the light from the lamp 7 supported by the

socket 8 through the plates 3. The reflectors are suitably painted within and without to reflect the light and between them is placed a lamp 9 supported by the socket 10.

The socket 10 is secured to the underside of the top of the reflectors and each socket is connected with a suitable source of electric current supply to illuminate the several 65 lamps of which there may be any desired number. It will be seen that as the lamp 9 is placed between the two reflectors 5 and 6 that it cannot be seen at some distance from the sign, while the angle of the reflectors can be varied to illuminate as wide 70 a place on the sidewalk as may be desired.

It will also be seen that no matter how brilliant the sidewalk illumination is there will be practically no loss of effect in the 75 transparency.

It will be understood by those familiar with the sign business that when a sign is ordered that the person purchasing the same often desires to add a line giving some other feature in connection with his place 80 of business other than that which he originally delineated upon the sign and this, the sign illustrated in Fig. 3, is especially adapted for that purpose.

In this form of the invention the sign 85 body 15 is substantially the same as the sign body shown in Figs. 1 and 2, and it is provided with two characters 16 and 16' which are illuminated by means of the lamp 17 placed within the sign body. At the bottom 90 of the sign body there are two reflectors 18 and 19, below which there is a lamp 20, while suspended from the lower portion of the sign is a sheet metal sign 21 bent over a rod 22 so that it presents two characters 95 for illumination by the lamp 20, and in order to increase the sidewalk lighting effect a lamp 23 is supported between the two sides of the inverted V shaped sign 21, suitable screws 24 being used to connect the socket 100 to the sign 21.

It will be understood that the lighting effect of this sign is the same as the previous one, since in no event do the lights shine directly into the eyes of the observer and 105 therefore do not kill the effect of the sign as a transparency.

Having thus described my invention what I claim as new and desire to secure by Letters Patent of the United States, is as fol- 110

lows, modifications within the scope of the claims being expressly reserved:

1. In an illuminated sign, a sign body, a lamp located within said body to illuminate a character carried thereby, a lamp below the first lamp to illuminate the sidewalk below the sign, and means intercepting the rays from the latter light when the sign is observed at some distance horizontally therefrom.
2. In an illuminated sign, a sign body, a translucent character carried thereby, a concealed light to illuminate said translucent character, a reflector below the lamp to direct the light from said lamp through the character, and another light upon the opposite side of said reflector from said first lamp for illuminating the sidewalk below the sign.
3. In an illuminated sign, a sign body, a translucent character carried thereby, a lamp within the sign body to illuminate the character, a reflector to direct the light from said lamp through the character, and another light adjacent said reflector so placed that the rays therefrom will strike the opposite side of the reflector and illuminate the sidewalk below the sign.
4. In an illuminated sign, a sign body having translucent characters on both faces thereof, a lamp within the sign, a pair of reflectors adapted to throw the rays of light

from said lamp through the characters, and another light between the two reflectors and from which reflectors the rays are reflected to the sidewalk.

5. In an illuminated sign, a sign body, translucent characters carried thereby, a lamp within the sign body to illuminate the characters, a reflector within the sign body to assist in the illumination of the characters, a second sign suspended from the lower portion of the first sign body, and a second lamp within the first sign upon the opposite side of the reflector from the first lamp and cooperating with the reflector to illuminate the sign suspended from the first sign body.

6. In an illuminated sign, a sign body, a lamp therein, translucent characters carried thereby, an inverted V-shaped sign supported from the lower edge of the first sign body, a lamp within the sign body to illuminate characters placed on the outside of the inverted V shaped sign, and another lamp between the sides of the inverted V shaped sign to illuminate the sidewalk.

In testimony whereof I have hereunto set my hand this 13th day of October A. D. 1914, in the presence of the two subscribed witnesses.

JOSEPH HOTCHNER.

Witnesses:

C. P. GRIFFIN,
L. H. ANDERSON.

Defendants' Exhibit "C."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "C." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monekton, Clerk.

935,803.

Patented Oct. 5, 1909.

Fig:1

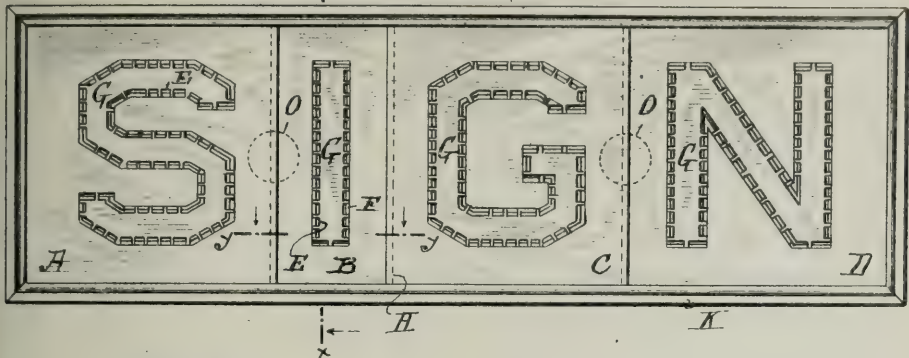


Fig:2

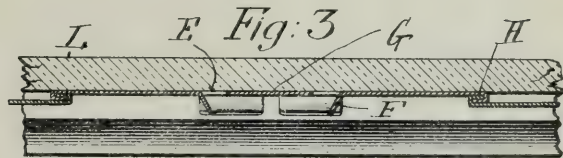
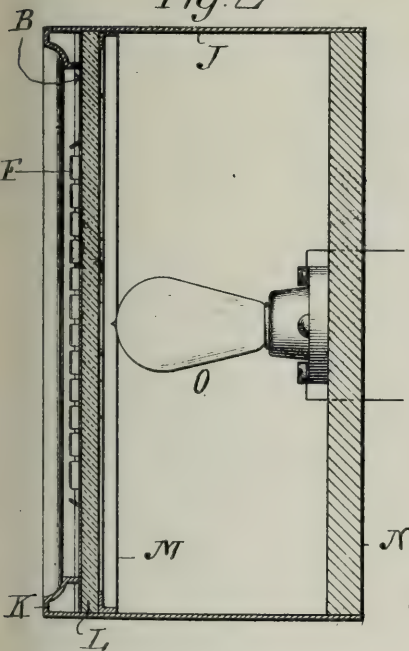


Fig:4

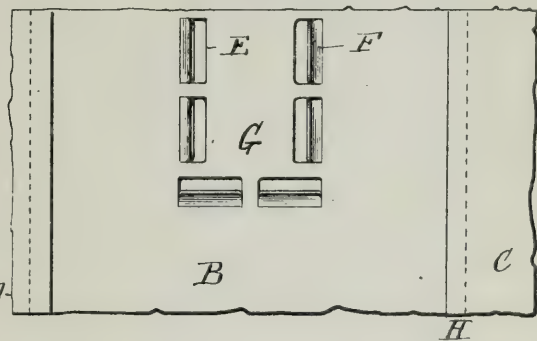
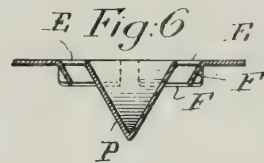
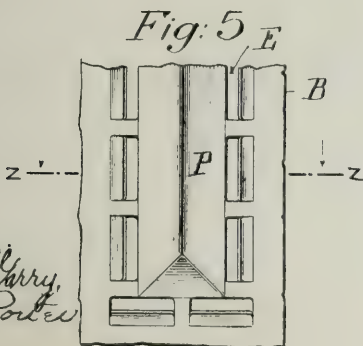


Fig:5



Witnesses:
May T. McFarry,
Gertrude T. Porter

Inventor
Thomas E. Murray
By his Attorney
Laird Benjamin

2

1

THOMAS E. MURRAY, OF NEW YORK, N. Y.

ELECTRIC SIGN.

935,803.

Specification of Letters Patent.

Patented Oct. 5, 1909.

Application filed October 24, 1908. Serial No. 459,344.

To all whom it may concern:

Be it known that I, THOMAS E. MURRAY, a citizen of the United States, residing at New York, in the county of New York and State of New York, have invented a certain new and useful Improvement in Electric Signs, of which the following is a specification.

The invention relates to electric signs and consists in a plate having on its surface a plurality of reflectors following the outline of a letter or character, and inclined to reflect light upon the portion of said surface included within said outline: also in the construction of said plate with openings following said outline, through which openings the light rays pass to said reflectors: also in the construction whereby said reflectors are formed upon the outer edges of said openings by striking up the metal of the plate: and also in the various combinations set forth in the claims.

In the accompanying drawings—Figure 1 is a front elevation of my electric sign. Fig. 2 is a cross section on the line *x, x*, of Fig. 1. Fig. 3 is a longitudinal section on the line *y, y*, of Fig. 1. Fig. 4 is an enlarged plan view of the lower part of the letter I in Fig. 1. Fig. 5 is a plan view of a portion of the letter I of Fig. 1, showing the body part of the letter raised above the general surface of the plate. Fig. 6 is a section on the line *z, z*, of Fig. 5.

Similar letters of reference indicate like parts.

The sign may comprise a single plate A, preferably of sheet metal, bearing a character, letter or word, or a plurality of such plates as A, B, C, D, each bearing a letter or character, and arranged to form a word or composite design. In each plate is formed a plurality of openings E following the outline of the letter or character. Said openings may be quadrangular in form, and produced by cutting the metal on three sides, leaving it attached on its fourth side or outer edge. The attached piece F is then bent outwardly and in inclined position, so that its inner inclined surface forms a reflector, whereby light, coming from the rear side of the plate through the opening E, is reflected upon the portion G of the plate surface which is included within the outline of the letter or character. In this way the said letter or character becomes defined not only by the light seen directly through the

openings E, but also by the reflected light cast upon the body portion of the outlined letter. This body portion may be painted white or polished so as again to reflect the rays to the eye of the observer, the remainder of the plate outside the reflectors F being preferably blackened. The inner surfaces of the reflectors F may also be whitened or polished so as to increase their reflecting capacity.

While it is preferable and cheaper to produce the reflectors F by striking up the material of the plate as described, it is obvious that they can be made separately and secured in suitable proximity to the openings in any desired way.

Where several plates are used to make up the sign, they may be connected by bending over and interlocking the meeting edges, as shown at H, Fig. 3. The plate is, or the plates are then inserted in a box J having on its front edge a frame K, against which said plates bear. In rear of the plates may be inserted a plate L of glass or other transparent medium, which is held in place by the inserted flanged frame M. Within the box and held in any desired way, as by attachment to the backboard N, I place a suitable number of glow lamps O, (dotted lines, Fig. 1) the light rays from which, pass through the openings E and are reflected as before described, upon the body portions of the letters or characters. The letters or characters may be made to appear of any desired color by using plates L of colored glass, or by making the bulbs of the glow lamps O of colored glass. The glass plates L serve the further function of preventing rain or moisture from entering the box J through the openings E.

Instead of leaving the portion of the plate surface, which is outlined by the openings E, flat, I may make it in relief and of any desired cross sectional shape. Thus in Figs. 5 and 6, I show the electric body in pyramidal form having sides P inclined preferably at the same angle as the reflectors F.

I claim:

1. A plate having a plurality of openings following the outline of a letter or character, and a plurality of inclined reflectors disposed on one side of said plate, and constructed to receive light rays coming through said openings and reflect the same upon the portion of the plate surface included within said outline.

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2. In an electric sign, a plate having a plurality of openings following the outline of a letter or character, a source of illumination on one side of said plate, and a plurality of reflectors on said plate and inclined to reflect the light rays coming through said openings upon the portion of the plate surface included within said outline.

3. An electric sign having illuminating lamps contained therein and one side or face thereof provided with a slot forming approximately the outline of a letter, and a reflecting flange extending upwardly from the outer edge of the slot, said flange being inclined whereby to reflect the light onto the metal forming the letter contained within the slotted outline, substantially as described.

4. An electric sign having illuminating lamps contained therein and one side or face thereof provided with a slot forming approximately the outline of a letter, the metal of said letter being held in place by cross pieces formed integral with said plate and letter, and a reflecting flange extending upwardly at an incline from the outer edge of the slot, whereby to reflect the light onto the metal forming the letter and contained within the slotted outline, substantially as described.

In testimony whereof I have affixed my signature in presence of two witnesses.

THOMAS E. MURRAY.

Witnesses:

GERTRUDE T. PORTER.

MAY T. MCGARRY.

Defendants' Exhibit "D."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "D." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

1,085,530.

Patented Jan. 27, 1914.

2 SHEETS—SHEET 1.

Fig-1-

Fig-2-

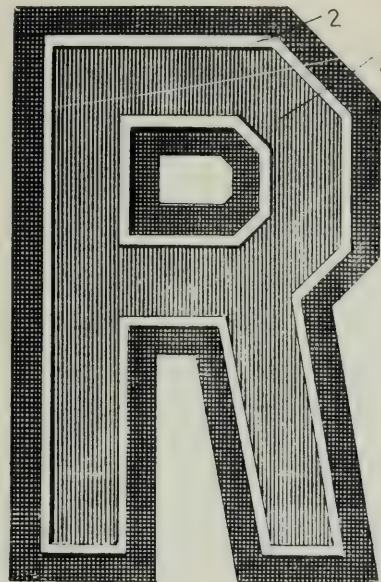
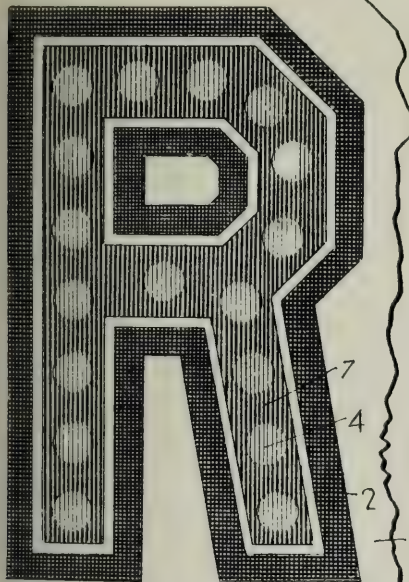
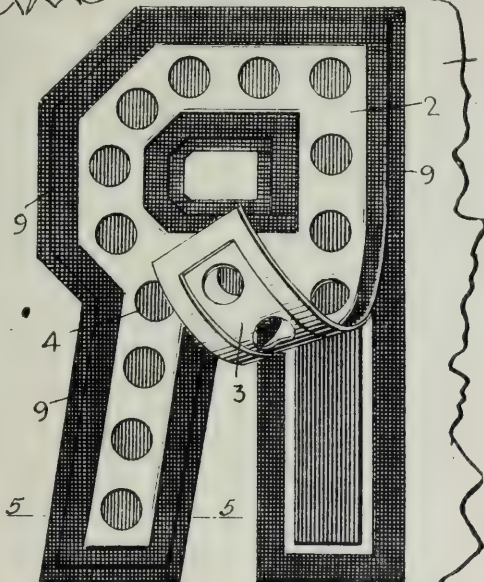


Fig-3-



WITNESSES

Frank C. Palmer,
L. Kitchen

INVENTOR

Walter H. Beck

BY *Mumoles*

1,085,530.

Patented Jan. 27, 1914.

2 SHEETS—SHEET 2.

Fig-4-

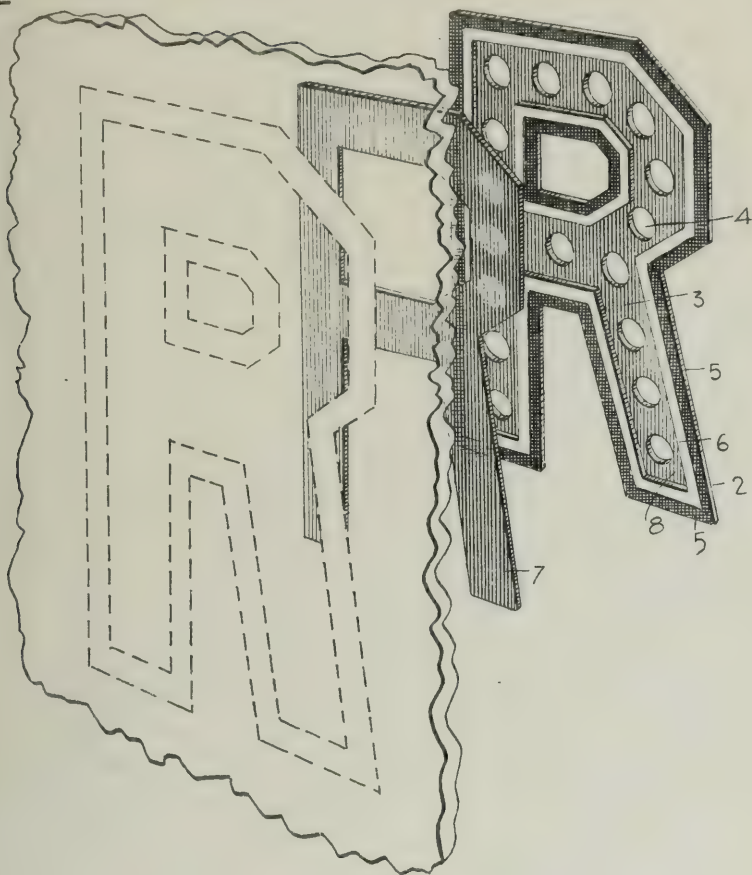
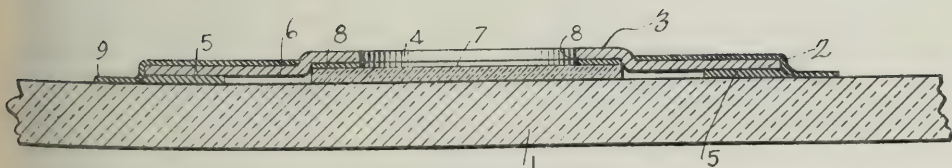


Fig-5-



WITNESSES

Frank C. Palmer

A. L. Kitchen

INVENTOR

Walter H. Bock

BY Munn & Co.

UNITED STATES PATENT OFFICE.

286

WALTER H. BOCK, OF NEW YORK, N. Y., ASSIGNOR OF ONE-THIRD TO VICTOR BOCK, OF NEW YORK, N. Y.

LETTER.

1,685,530.

Specification of Letters Patent.

Patented Jan. 27, 1914.

Application filed March 10, 1913. Serial No. 753,132.

To all whom it may concern:

Be it known that I, WALTER H. BOCK, a citizen of the United States, and a resident of the city of New York, Corona, borough of Queens, in the county of Queens and State of New York, have invented a new and Improved Letter, of which the following is a full, clear, and exact description.

This invention relates to improvements in signs, and particularly to signs or letters having translucent portions, and has for an object to provide an improved structure which is adapted to be clearly seen either day or night.

Another object in view is to provide an improved letter with an apertured base or background structure arranged in the form of a letter or configuration designed to be presented, and a translucent covering for the apertured portion of the design and conforming to the arrangement of the apertures so that during the day the translucent covering will be seen, and during the night the outline of apertures, a lamp or suitable light to be placed in back thereof.

A still further object of the invention is to provide a letter or sign structure formed with an outline of translucent material but colored to a certain extent so as to hide from view anything placed in back thereof when viewed from a distance, and a background or base placed back of the translucent portion of the letter or configuration formed with apertures conforming to the desired letter, whereby the letter or configuration may be seen during the day, and may be seen during the night after a light has been placed in back thereof.

In carrying out the objects of the invention, the letter is adapted to be placed upon a transparent support, as for instance a glass window, and secured by any desired means, as for instance a suitable adhesive. In forming the letter a base is provided of the shape of letter desired and pressed until there is a depressed portion forming the letter. Arranged in this depressed portion are a plurality of apertures following the depression so that when a light is placed in back thereof the same will shine through the apertures and give the correct outline of the letter. A translucent substance, as for instance colored celluloid, is placed in the depressed portion and then the entire

letter, including the celluloid filling, is secured to the glass support by an adhesive. In order to properly finish the letter a border is painted around the letter of a different color from the base or the celluloid filling.

A practical embodiment of the invention is represented in the accompanying drawings forming a part of this specification, in which similar characters of reference indicate corresponding parts in all the views.

Figure 1 is a front view of a letter as the same appears at night; Fig. 2 is a view similar to Fig. 1 except that the same shows the letter as it appears during the day; Fig. 3 is a rear view of the letter shown in Figs. 1 and 2, part of the base being raised for better illustrating the construction; Fig. 4 is a perspective view showing the glass support and parts of the letter separated; and Fig. 5 is a section through Fig. 3 approximately on the line 5-5, the same being shown on an enlarged scale.

Referring to the accompanying drawings by numerals, 1 indicates a glass support of any kind, as for instance the glass in show windows. Connected to glass 1 is a base 2 formed of any desired material, as for instance metal of a shape of the letter desired. It will be understood that other configurations besides letters could be formed without departing from the spirit of the invention, and that the expression letter will include such other configurations. The base 2 is provided with a depression or pressed out portion 3 which conforms to the shape of the letter and in which is arranged a plurality of apertures 4 so that when a light is placed in back of the base 2 the outline of the letter will be seen through apertures 4. The base 2 may be formed from some bright material, as for instance tin-foil, gold, or other metal. When formed in this manner, an adhesive layer 5 is placed around the edge whereby means are provided for securing the base 2 to the glass 1, and also a border 6 is provided which clearly shows up in Figs. 1, 2, and 4. In applying the adhesive 5, the same is preferably colored so as to form a contrast with the border 6 and also with the translucent form 7. The form 7 may be colored to any desired extent provided the same is not made opaque. The form 7 is adapted to

fit into the depression 3, and in order to hold the same properly in place, an adhesive layer 8 is applied to the depression 3. This adhesive layer is formed of substantially the same color as the coloring matter in the form 7, so that the color of the translucent form 7 is deepened in order to give the form an opaque appearance, or if the form 7 is perfectly clear, the coloring matter will act as a background therefor, though ordinarily the form 7 is provided with a sufficient color to prevent an observer from seeing the apertures 4 during the day in order that the letter will appear as a clear plain letter as disclosed in Fig. 2. After the form 7 and base 2 have been assembled, they are applied to the glass 1 and then a border 9 of any suitable paint is applied so as to set out more clearly the letter. Also the border 9 is adapted to hide any irregularities in the periphery of the base 2, as the border can be made perfectly straight notwithstanding irregularities of the form. It will be noted that the adhesive 5 and the border 9 are of the same color so as to form a continuous border line as shown in Figs. 1 and 2.

Having thus described my invention I

claim as new and desire to secure by Letters Patent:—

A letter of the character described consisting of a metal base forming the outline of a letter, said base having a depressed portion conforming to the letter and a radiating flange all around the depressed portion, said depressed portion being provided with a plurality of apertures, a translucent form mounted in said depressed portion and substantially filling the same, a coloring matter arranged in said depressed portion between said form and said metallic base, said coloring matter being substantially of the same color as the translucent form, whereby the color of the translucent form is deepened in order to give the same an opaque appearance, and a layer of adhesive matter arranged around the radiating flange on said base for securing the base to a support.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

WALTER H. BOCK

Witnesses:

MARY R. TUOHY,
MARGARET DE S. COPPELL.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

Fig. 1.

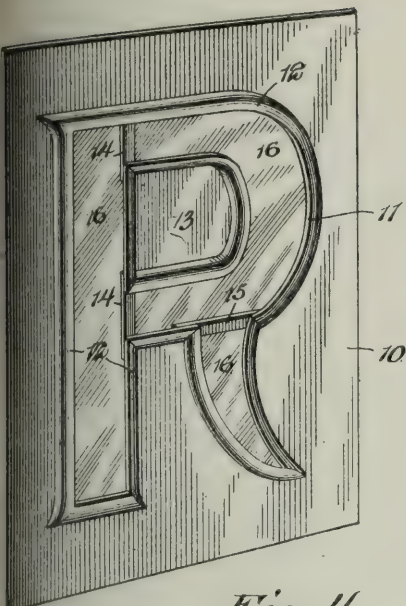


Fig. 2.

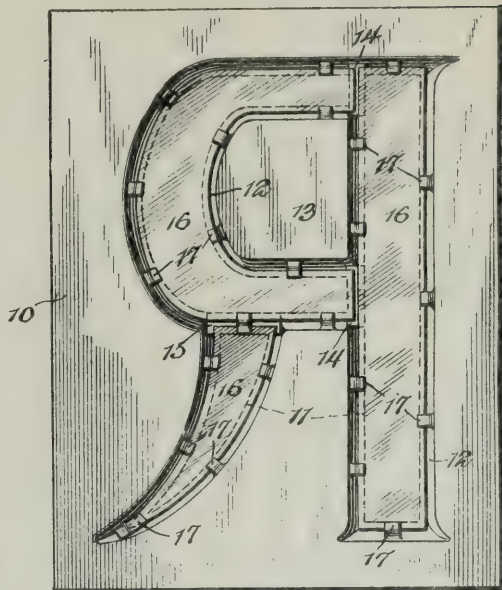


Fig. 4.

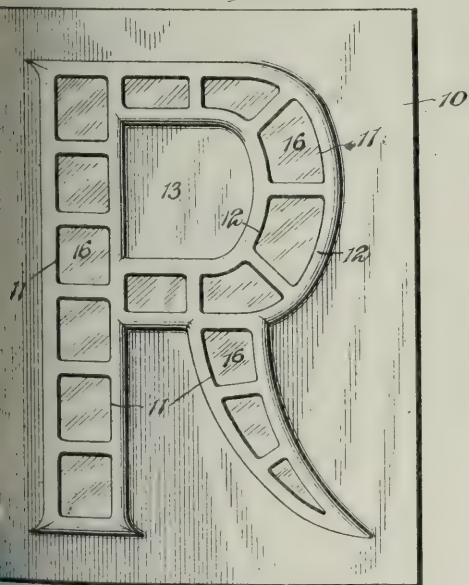


Fig. 3.

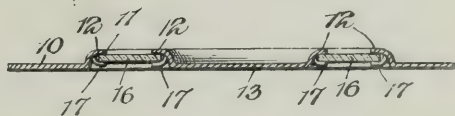


Fig. 5.



Lambert H. J. Müller-Thym,
Inventor,

Witnesses
Howard W. Orr.
B. J. Foster

By *E. J. Siggers*
Attorney

UNITED STATES PATENT OFFICE.

LAMBERT ANTON JOSEPH MULLER-THYM, OF NEW YORK, N. Y.

SIGN.

SPECIFICATION forming part of Letters Patent No. 716,078, dated December 16, 1902.

Application filed July 23, 1902. Serial No. 116,710. (No model.)

To all whom it may concern:

Be it known that I, LAMBERT ANTON JOSEPH MULLER-THYM, a subject of the Queen of the Netherlands, residing at New York, in the county of New York and State of New York, have invented a new and useful Sign, of which the following is a specification.

This invention relates to signs, and more particularly to that class which can be used in the day-time and illuminated at night.

The object of the invention is to provide a structure that is easily manufactured, and therefore comparatively inexpensive, at the same time being strong and durable and not affected to any material extent by the elements.

The preferred embodiment of the invention is fully illustrated in the accompanying drawings and described in the following specification.

In said drawings, Figure 1 is a perspective view of the front or exposed face of the improved structure. Fig. 2 is a view in elevation of the rear face. Fig. 3 is a sectional view through the same. Fig. 4 is a view in elevation of a slightly-modified form. Fig. 5 is a detail view to show the reflecting coating.

Similar numerals of reference designate corresponding parts in all the figures of the drawings.

In this embodiment of the invention a face-plate 10 is employed, which is formed of sheet metal, intermediate portions of said plate being stamped or struck in from one side and projecting from the opposite side, forming a suitable character, in this instance shown as the letter "R." The central portion of this stamped letter is cut out, as shown at 11, to form an opening through the face-plate, said opening conforming to the shape of the letter and being of less width than the stamped portion, as clearly illustrated in Figs. 1, 2, and 3. As a result oppositely-disposed overhanging flanges 12 are formed around the edges of said opening. The intermediate portion 13 of the plate, which is completely surrounded by the opening, is held in place by suitable strips 14, which extend from said intermediate portion across the opening, as shown. Other brace-strips, as 15, may also be employed. Transparent material 16, pre-

erably glass, is cut to the form of the stamped letter or character and is fitted within the rear portion of the same, as shown in Fig. 2. This material is wider than the opening and engages the flanges 12. It is held in place by suitable fastening-tongues 17, that are secured within the stamped portion and extend over the edges of said material, terminating at the opening, as clearly shown in the drawings. In practice the inner face of the sheet is coated with suitable reflecting material, and the flanges are also coated, this coating of the flanges reflecting the light inwardly and serving to make the edges of the transparent letter brighter than the central portions, and as a consequence said letter presents a more pleasing appearance. In Fig. 4 the construction is substantially the same, with the exception that a plurality of spaced openings are formed in the stamped portion instead of a continuous opening, as is illustrated in the first three figures. In practice these letters may each be formed on a separate plate and afterward secured together to form the sign, a sign so constructed forming, of course, the front face of a suitable casing, within which the lights are housed, or a plurality of letters constructed by a special die may be formed in a single sheet.

There are many advantages for this structure. In the first place, with the exception of the transparent material, it is constructed entirely of metal, and is therefore not affected to any great extent by the elements. By stamping the letters or other characters from the plate said letters or characters are raised, which is a very desirable feature in signs, and, furthermore, the outstanding flanges serve to strengthen the sheet and prevent its being bent. The glass is entirely housed within the shaped portion, so that the inner face of the sheet is smooth, and, furthermore, the glass is protected by the surrounding flanges.

From the foregoing it is thought that the construction, operation, and many advantages of the herein-described invention will be apparent to those skilled in the art without further description, and it will be understood that various changes in the size, shape, proportion, and minor details of construction may be resorted to without departing from

the spirit or sacrificing any of the advantages of the invention.

Having thus described my invention, what I claim as new, and desire to secure by Letters

5 Patent, is—

1. In a sign, a face-plate having a portion stamped from the same and projecting from one face, said portion being provided with openings forming a design or character, transparent material fitted in the stamped portion and covering the openings, and tongues secured to the face-plate and engaging the transparent material to hold the latter in place.

2. In a sign, a sheet-metal plate having a portion stamped in outline from the body thereof and being provided with an opening, said stamped portion projecting from one side of the plate, leaving a corresponding recess in the opposite side, the raised character or design providing outstanding flanges which serve to strengthen the plate while the recess forms a receptacle or pocket, in combination with transparent material arranged in said receptacle or pocket and covering the opening, and fastening means secured to the face-plate and engaging the transparent material to hold the latter in place, said fastening means terminating at the opening, so as to be invisible from the outer side of the plate.

3. In a sign, a face-plate having a design or character stamped from the same and projecting from one face, said design or character being provided with an opening that conforms to the shape of the same, the width of

the opening being less than the width of the design or character, whereby keeper-flanges are formed on opposite sides of the same, transparent material fitted between the flanges and extending across the opening, and fastening-tongues arranged in the stamped portions of the plate and engaging over the edges of the transparent material.

4. In a sign, a face-plate having an opening therethrough and outstanding flanges arranged on opposite sides thereof, transparent material arranged over the opening and held in place against the flanges, and a reflective coating arranged upon the inner faces of the flanges.

5. In a sign, a plate having a character or design stamped in outline from the body thereof, said stamped portion being provided with an opening, the stamped portion projecting from one side of the plate and leaving a corresponding recess at the opposite side, the raised character or design providing outstanding flanges which serve to strengthen the plate while the recess at the other side of the plate forms a receptacle or pocket, in combination with transparent material held in said receptacle or pocket so as to close the opening in the plate.

In testimony that I claim the foregoing as my own I have hereto affixed my signature in the presence of two witnesses.

LAMBERT ANTON JOSEPH MULLER-THYM.

Witnesses:

IRME DOLCE,

CARL SCHNEIDER.

Defendants' Exhibit "E."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "E." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

[This Drawing is a reproduction of the Original on a reduced scale.]

Fig. 1.

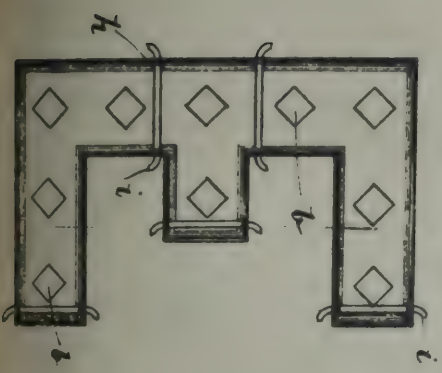
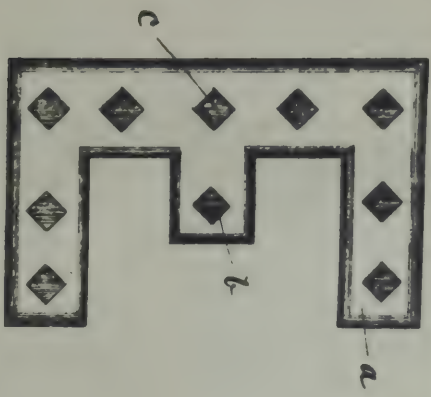
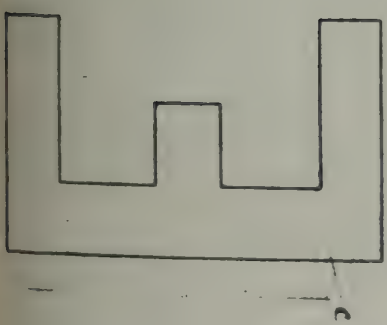
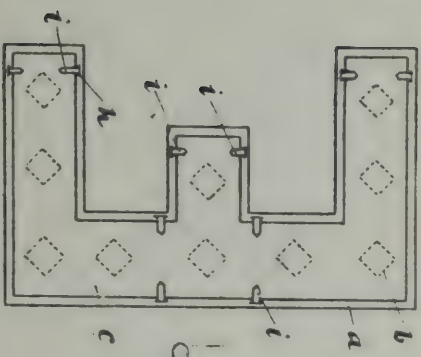


Fig. 3.





Date of Application, 16th June, 1900

Complete Specification Left, 15th Apr., 1901—Accepted, 25th May, 1901

PROVISIONAL SPECIFICATION.

Improvements in and connected with Letters and Signs for Advertising and other Purposes

We **ALFRED CHARLES AMY** and **HENRY BATTAMS** trading as Garnier and Company of 86 Farringdon Street in the City of London Enamelled Copper Letter Makers do hereby declare the nature of this invention to be as follows:—

The object of this invention is to construct letters for advertising and other purposes in such a manner that they may be visible at night as well as in the daytime. Now according to this invention we form the letters of metal and enamel them in the usual way but instead of the letters being plain we perforate them with a number of holes or slots of any suitable size and shape the said perforations following the contour of the letters

At the back of the letters we attach a strip or strips of transparent material such as celluloid mica or gelatine colored or otherwise so that when the letters are secured to a shop window or to any other transparent or translucent surface and any illuminant is placed behind them the light will shine through the celluloid mica gelatine or other material at the back of the perforations and render the sign or advertisement visible by artificial light as well as by daylight. The transparent material may be secured to the back of the letters by any suitable cement or the edges of the letters may have projections thereon which may be turned over to hold the said material in place.

Or the edges of the letters may be beaded or turned over the transparent material.

Or the letters may have slits formed in them before being enamelled and thin copper strips passed through the said slits the ends of the said strips after the letters are enamelled being turned over the transparent material to hold it in place

Advertising tablets and signs may be similarly formed by perforating the letters or design to be displayed and attaching a transparent substance to the back of the tablet or by attaching letters constructed as hereinbefore specified to a transparent backing or by attaching perforated letters to a colored transparent or translucent tablet

Dated this 16th day of June 1900

T. E. HALFORD

82 Mark Lane London E C Agent for Applicants.

COMPLETE SPECIFICATION.

Improvements in and connected with Letters and Signs for Advertising and other Purposes

We **ALFRED CHARLES AMY** and **HENRY BATTAMS** trading as Garnier and Company of 86 Farringdon Street in the City and County of London Enamelled Copper

appears as a letter formed of a series of colored diamond shaped dots at intervals thus enabling the advertisement name or other combination formed of letters constructed as specified to be read at night as well as in the daytime

5 The letters may be secured to windows and the like by means of white lead or a suitable cement in the usual way.

The perforations may be of any suitable size and shape.

10 When making advertising tablets and signs according to this invention the letters may be formed by cutting away the material of which the tablet or sign is composed to form the outline of the letters or design and attaching the transparent material to the back of the tablet by any of the means hereinbefore described or by forming the letters or design on the surface of the tablet in different colored enamels and perforating the tablet where necessary in a similar manner to that hereinbefore described for forming letters transparent material colored or otherwise being attached to the back of the tablet as specified so as to render the advertisement or sign visible both by day and night.

15 Or the advertisement or sign may be formed by attaching perforated enamelled or other opaque letters to a colored transparent tablet or the advertisement or sign may be formed by attaching letters constructed as hereinbefore specified and shewn by the drawings to a sheet of glass or other suitable transparent material

20 Having now particularly described and ascertained the nature of our said invention and in what manner the same is to be performed we declare that what we claim is:--

1 Letters for advertising and other purposes constructed of enamelled copper or other suitable opaque material having perforations therein following the contour of the letters and a suitable transparent material (preferably coloured) attached to the back thereof by any suitable means such as a suitable cement or by means of strips of thin metal passed through slits therein and turned down over the said transparent material all substantially as specified.

2 Advertising tablets and signs constructed of an opaque material having 30 letters or designs or both perforated therein or perforated and displayed thereon with a transparent substance at the back thereof and secured thereto by any suitable means.

3 Advertising tablets and signs consisting of a transparent substance such as glass having letters or devices constructed as hereinbefore specified attached 35 thereto for the purpose stated.

4 Letters signs and tablets constructed as hereinbefore specified and shewn by the accompanying drawings

Dated this 14th day of April 1901

T. E. HALFORD

82 Mark Lane London E C Agents for Applicant

Defendants' Exhibit "F."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court
Nor. Dist. Calif. Deft. Exhibit "F." Filed
12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Ap-
peals for the Ninth Circuit. Filed Jul. 11, 1922.
F. D. Monckton, Clerk.

BREVET D'INVENTION

du 25 août 1903.

XX. — Articles de Paris et petites industries.

4. — INDUSTRIES DIVERSES.

N° 334.837

Brevet de quinze ans demandé le 25 août 1903 par M. Hector VÉRY résidant en France.

Nouvelle lettre lumineuse en relief.

Délivré le 5 novembre 1903; publié le 4 janvier 1904.

Dans la fabrication des lettres ou motifs mineurs en relief usités jusqu'ici, on a dû employer, dans la plupart des cas, des matières transparentes qui doivent être travaillées par des procédés spéciaux (soufflage ou moulage à chaud pour le verre et le cristal), procédés qui exigeaient un matériel très coûteux et ne pouvaient s'appliquer qu'à des pièces de dimensions restreintes.

La présente invention a pour objet un nouveau système de lettres et attributs en relief fabriqués en matière transparente ou transparente et pouvant être rendus lumineux par un mode quelconque d'éclairage : électricité, gaz, acétylène, pétrole, alcool, etc.

Ce système comporte un mode de montage spécial basé sur le fait que l'on emploie, pour obtenir la forme des lettres en relief, une ossature ou charpente métallique dont les contours dessinent les arêtes des lettres ou épousent les formes courbes qu'on veut leur donner suivant le style adopté, cette ossature étant disposée pour recevoir, par des modes de fixation ordinaires, les parois transparentes constituant la surface des lettres ou attributs, et qui seront composées, non pas d'une seule pièce, mais d'éléments séparés facilement assemblables dans l'ossature et permettant l'obtention de lettres et attributs de toutes dimensions.

Le dessin ci-joint représente, à titre d'exemple, ce nouveau mode de fabrication;

Figure 1 étant une vue en perspective de l'ossature d'une lettre simple;

Figure 2, une coupe transversale par A B d'une lettre suivant figure 1 et à plus grande échelle;

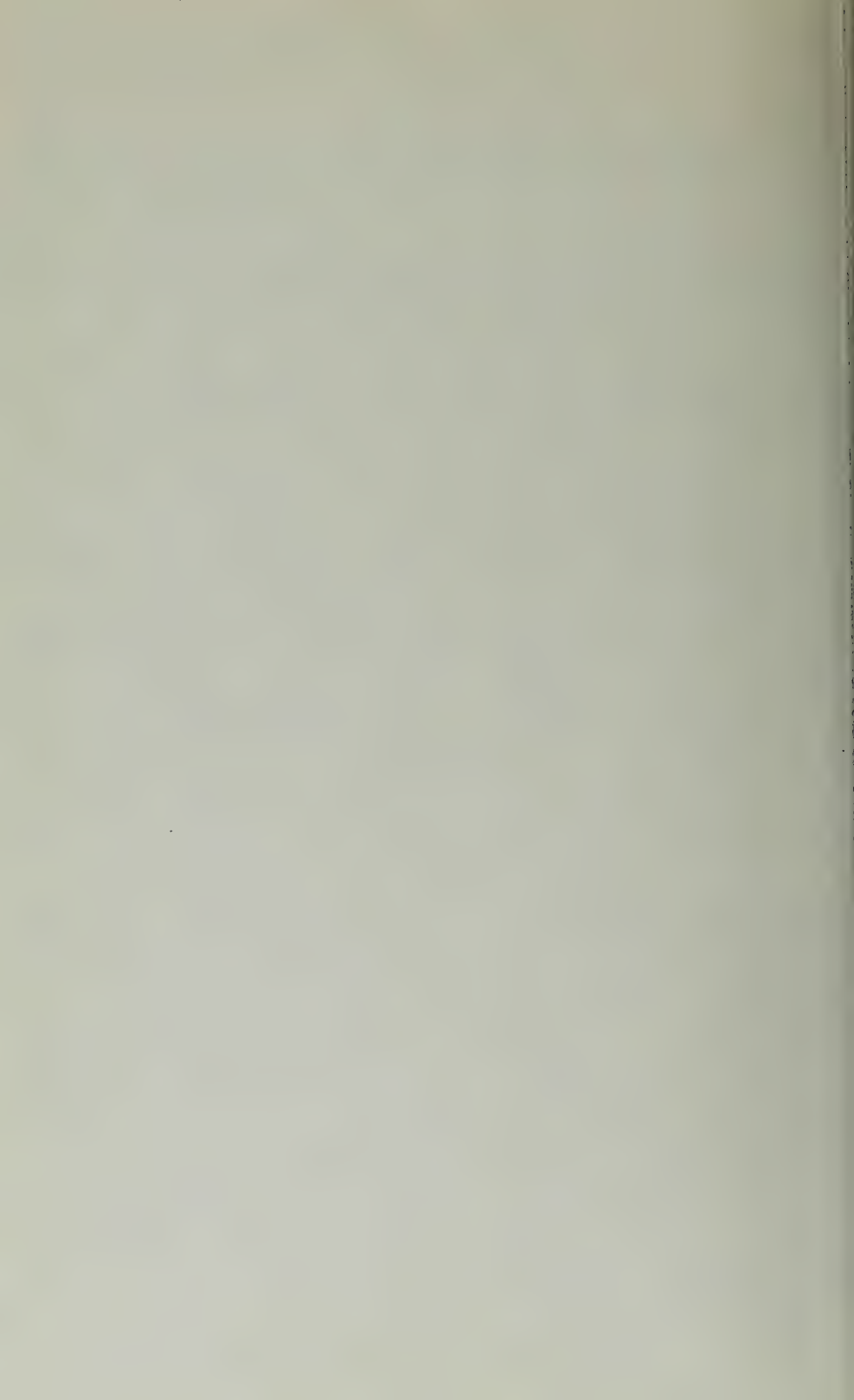
Les figures 3 à 6 montrent les modes de constitution de différentes lettres à l'aide d'éléments;

Les figures 7, 8 et 9 montrent, entre autres, trois types de caractères auxquels le principe est également applicable;

Les figures 10 à 15 montrent schématiquement en coupe différentes sections de caractères que l'on pourra adopter.

En se reportant aux figures 1 et 2, on voit que l'ossature *a* pourra être constituée de préférence en une seule pièce de métal fondu, et plus particulièrement de métaux fusibles facilement : zinc, plomb, étain, etc., ou aussi des alliages de ces métaux. Mais on pourra de même constituer cette ossature à l'aide de lames étirées au profil choisi et assemblées ensuite par soudure ou par vis, ou encore à l'aide de feuilles découpées, estampées ou sciées et pliées ensuite pour constituer une section convenable permettant la fixation facile des parties transparentes *b*. Cette fixation pourra être faite à l'aide de pattes *c* ou de toute autre façon.

En ce qui concerne la constitution des parties transparentes en éléments assemblables



dans les ossatures, on remarque que, d'après la forme des différentes lettres, ces éléments peuvent se réduire à 7 ou 8 types, dont 5 sont représentés en *d. e. f. g. h.* dans les lettres que représentent les figures 3 à 6. Ces éléments-types peuvent aussi servir à constituer facilement les autres lettres de l'alphabet.

Il sera donc très économique, et spécialement pour les lettres et attributs de grandes dimensions, de constituer des lettres quelconques et de styles quelconques, par assemblage de ces éléments-types en combinaison avec les ossatures déjà décrites en métal fondu, étiré ou estampé; les figures 7, 8 et 9 montrent par exemple trois styles de lettres qui pourraient être fabriqués par le même procédé, comme décrit précédemment, lequel s'appliquera aussi, bien entendu, avec les modifications de détail nécessaires, à tous autres styles et à toutes les sections désirées représentées à titre d'exemple aux figures 10 à 15 : rectangulaire, triangulaire, demi-ronde, etc.

La nature de la matière des parois *b* destinées à laisser passer la lumière pourra être quelconque à condition d'être transparente ou translucide, mais ce seront de préférence : le verre, ou le cristal, clair, dépoli ou de couleur, lisse, gravé ou à rayures, décoré d'émail, d'or ou d'argent, ou de toutes combinaisons d'ornementations quelconques, le celluloid, le papier imprégné, l'onyx, etc., et, en résumé, toute matière naturelle ou fabriquée laissant passer la lumière.

Les lettres ainsi constituées pourront être montées soit sur une boîte séparée pour chacune

d'elles, et pouvant s'ouvrir pour rendre accessible le foyer lumineux intérieur dont elle sera en tous cas pourvue; soit sur un panneau d'ensemble constituant alors un ou plusieurs mots ou un motif composé, la boîte sur laquelle sera monté ledit panneau étant également accessible pour le but sus-spécifié. Dans ce dernier cas, l'éclairage intérieur sera réalisé par un nombre quelconque de lampes ou foyers lumineux.

De plus, qu'il s'agisse de lettres séparées ou de panneaux d'ensemble, le fond de la boîte pourra être remplacé par une deuxième lettre ou une seconde inscription, de façon à obtenir deux faces lumineuses.

Les côtés ou faces obliques de chaque lettre pourront être transparentes ou non et ornementées à volonté.

EN RÉSUMÉ, je revendique une nouvelle lettre lumineuse en relief, à foyer lumineux intérieur, caractérisée en ce qu'elle est constituée par une ossature en métal fondu, laminé ou estampé, en une ou plusieurs pièces soudées ou assemblées, cette ossature dessinant les arêtes ou contours de chaque lettre ou attribut, et étant destinée à supporter les parties transparentes en matière quelconque naturelle ou fabriquée, constituées par des éléments-types assemblés dans ladite ossature et fixés de façon quelconque; le tout tel que décrit ci-dessus et représenté, à titre d'exemple, au dessin annexé.

HECTOR VÉRY.

Par procuration :

RIGOT et PRÉVOST.

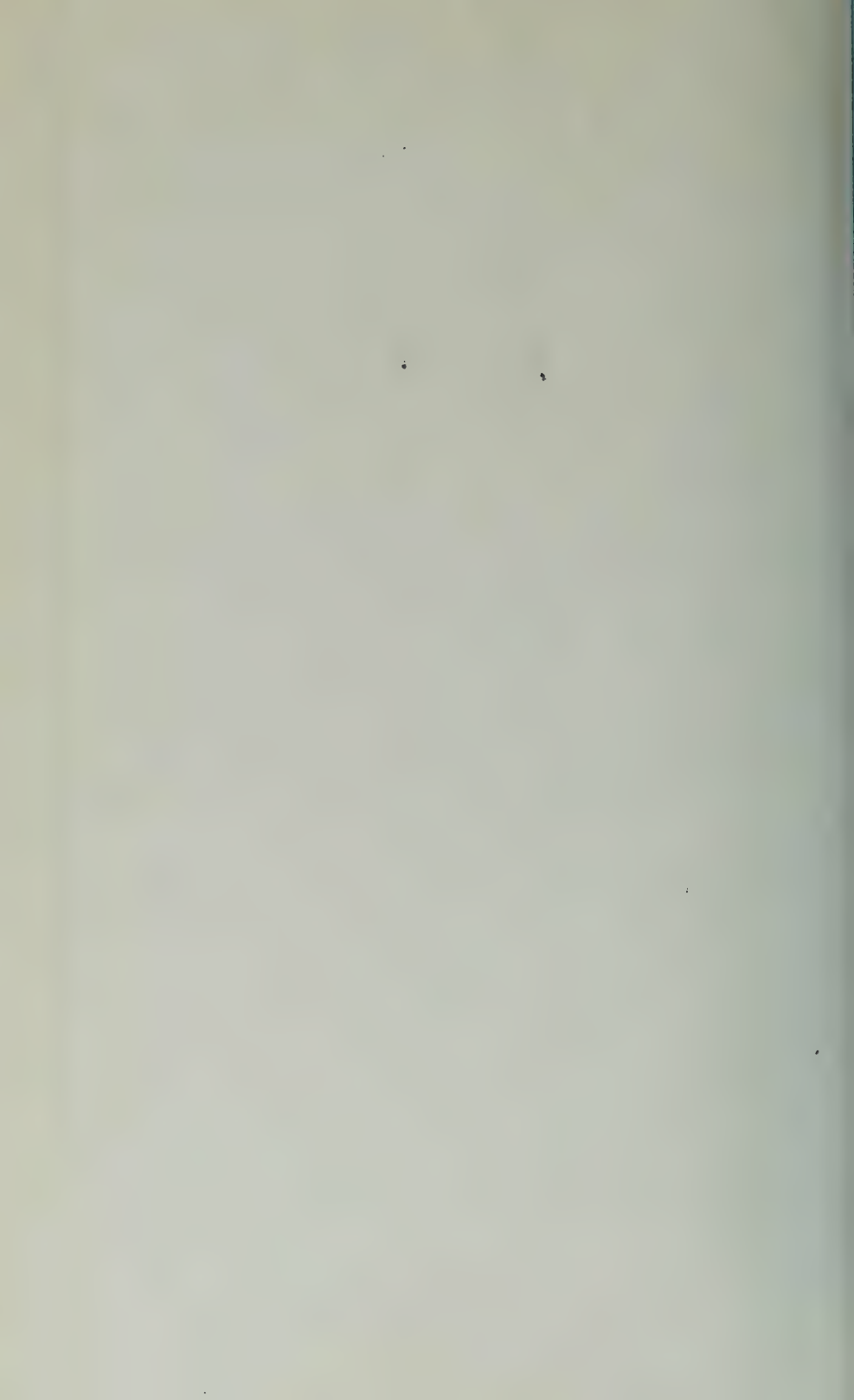


Fig. 1.

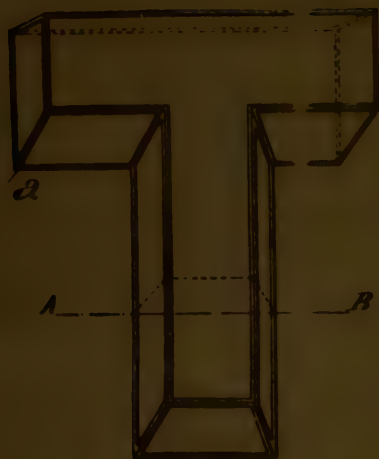


Fig. 2.

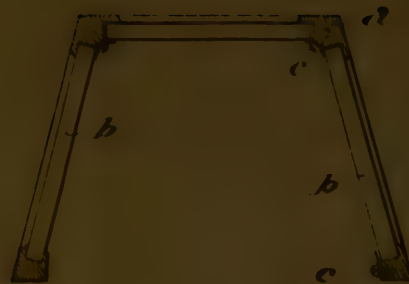


Fig. 3.



Fig. 4.



Fig. 5.



Fig. 6.

Fig. 7.

Fig. 8.

Fig. 9.



Fig. 13.



Fig. 14.



Fig. 10.



Fig. 11.



Fig. 12.



Fig. 15.



Defendants' Exhibit "G."

[Endorsed]: No. 507 & 577. U. S. Dist. Court,
Nor. Dist. Calif. Deft. Exhibit "G." Filed
2/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Ap-
peals for the Ninth Circuit. Filed Jul. 11, 1922.
F. D. Monckton, Clerk.

**Translation of French Patent No. 334,837, Dated
August 25, 1903, and Granted to Hector Very.**

FRENCH REPUBLIC.

**NATIONAL OFFICE OF INDUSTRIAL PROP-
ERTY,**

Patent of Invention of August 25, 1903.

XX—Paris Specialties and small industries.

4—Various Industries.

No. 334,837

Fifteen years Patents requested on August 25th,
1903, by M. HECTOR VERY, resident of
France.

New embossed letters.

Released November 5th, 1903; published January
4, 1904.

In the fabrication of letters or luminous embossed
designs now used, it has been customary to make
use of, in the majority of cases, transparent mate-
rials that must be worked by special processes (hot
blowing or molding for glass and crystal) processes
that require very expensive materials, and that
could only be applied to pieces of restricted dimen-
sions.

The present invention has for its object a new system of letters and characters in relief, made of transparent or translucent substance, that could be made luminous by means of illumination; electricity, gas, acetylene, petroleum, alcohol, etc.

This system requires a manner of setting (or mounting) specially deep depending upon the object for which it is to be employed, to obtain the form of letters in relief, on a skeleton or metallic frame, the contour of which designates the angles of the letters. Where the curved forms may be necessary, according to the style adopted, the skeleton is disposed to receive, by manner of ordinary fixation, the transparent walls constituting the surface of the letters or characters, and this is to be composed, not of only one piece, but of separate elements, easy to assemble in the framework and permitting the production of letters and characters of all dimensions. The design herewith is a correct example of the new manner of fabrication;

Figure 1 is a perspective view of the framework of one simple letter.

Figure 2 is a transverse section on A B of a letter next to figure 1 and has the shape of a raised letter.

The figures 3 to 6 show the manner of the formation of the different letters with the aid of the elements:

The figures 7, 8 and 9 show, among others, three types of letters, and as to these the same principle is equally applicable.

Figures 10 to 15 show a sketch of a different form of cutting sections of characters that could be adopted.

Referring again to figures 1 and 2 we see that the framework A could be constructed, preferably, of only one piece of melted metal, and particularly of fusible metals; zinc, lead, tin, etc., and also of the alloys of these metals. The framework could also be made with the aid of plates stretched in profile selected and assembled afterwards by welding or by screws, or with the aid of sheets cut-out, stamped or sawed and folded after to constitute one section suitable to allow the transparent parts B to be easily fixed thereto. The parts B may be secured with the aid of clamps, hooks C, or in any other way.

Concerning the constitution of the transparent parts is assembling elements within the framework, we remark that according to the form of the different letters, these elements could be reduced to 7 or 8 types, of which 5 are represented on d, e, f, g, h, within the letters that are represented by Figures 3 to 6. These element-types, may also serve to easily produce the other letters of the alphabet. It will be therefore very economic, and specially for the letters and characters of large dimensions, to produce whatever letters and of whatever styles, by assembling those element-types in combination with the framework, before described, in melted metal, printed or engraved. The figures 7, 8 and 9 are examples showing three styles of letters that could be made by the same process, as previously described, that may also be applied, it will be understood with detailed necessary modifications, to all other styles and to all other desired sections, examples of which

are shown in Figures 10 to 15; rectangular, triangular, demi-round, etc.

The nature of the substance of the walls (sides) B intended to allow the light to pass can be any material on condition that it must be transparent or translucent, of preference; The glass or the crystal, clear, unpolished, or painted, smooth, engraved or with stripes, ornamented with enamel, gold or silver, or ornamented with all combinations; the celluloid, the impregnated paper, the onyx, etc., and, in résumé, all natural or manufactured substances through which light could be seen.

The letters constituted in this manner could take an upward direction, or mounted may it be by putting them in separated boxes for each and every one of them, and the boxes can have openings to render accessible the interior luminous light; the light in all cases must be seen; be it upon a panel of general effect, consisting of one or several words, or an ornamental design, the case upon which the said panel is mounted to be equally accessible for the purpose above specified.

In the last case, the interior illumination will be produced by any number of lamps or fire-grates luminous.

Again, having on hand separated letters or panels of general effect, the bottom of the case could be replaced by a second letter or other inscription, in such way that two luminous fronts may be obtained.

The sides or oblique faces of each letter could be transparent or not and ornamented at will.

After all, I claim a new luminous letter in relief, of internal luminous fire or light, characterized and the same to be constituted of a framework (skeleton) of melted metal, plated or printed (stamped) of one or several pieces, soldered or assembled, that framework (skeleton) showing prominently the angles or contours of each letter or character, and intended to support the transparent parts (parcels) of any substance, natural or fabricated, to constitute by the element-types assembled within said framework (skeleton) and fixed in any way whatever; and everything herein and above described and represented, by right of example, may be seen on the annexed drawing.

HECTOR VERY.

By Power of Attorney,
RIGOT and PREVOST.

[Endorsed]: No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Hotchener, Appellant, vs. Federal Electric Company et al., Appellees. Translation of French Patent No. 334,837, Dated August 25, 1903, and Granted to Hector Very. Filed Aug. 3, 1922. F. D. Monckton, Clerk.

Fig. 1.



Fig. 2.

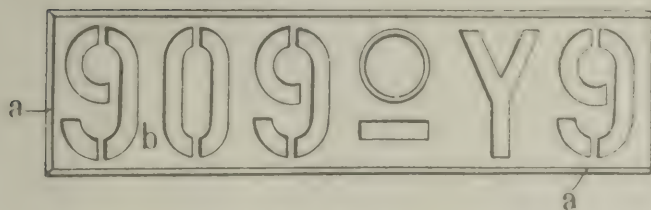


Fig. 3.

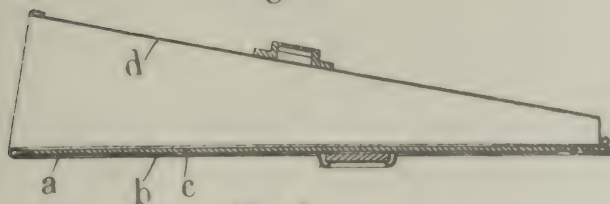


Fig. 4.



Fig. 5.



Fig. 6.

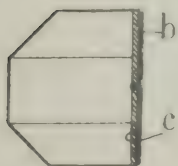
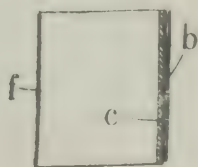


Fig. 7.



Defendants' Exhibit "H"

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "H." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

Defendants' Exhibit "I"

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Specification and Drawing, in the matter of the

French Letters Patent to
BOLDES,

Dated September 17, 1903. Number 335,943.

Lettres pour enseignes.

Attached, hereto, is a translation, made by the Official Translator, of the Specification, in the matter of the same.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed in the District of Columbia this 17th day of March, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the United States of America the one hundred and forty-fifth.

[Seal]

M. H. COULSTON,
Commissioner of Patents.

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "I." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

OFFICE NATIONAL DE LA PROPRIÉTÉ INDUSTRIELLE.

BREVET D'INVENTION

du 17 septembre 1903.

XX. -- Articles de Paris et petites industries.

4. -- INDUSTRIES DIVERSES.

N° 335.943

Brevet de quinze ans demandé le 17 septembre 1903 par M. Hugues BOLDÈS rési-
dant en Allemagne.

Lettres pour enseignes.

Délivré le 22 décembre 1903; publié le 20 février 1904.

La présente invention se rapporte à un nouveau dispositif de lettres pour enseignes, ces lettres pouvant être lumineuses ou non, être montées soit sur des panneaux complets, soit de façon à constituer des éléments par boîtes séparées, à simple, double ou triple face, ces éléments pouvant être aussi interchangeables, et le principe de ce mode d'établissement pouvant être également appliqué à la constitution de motifs, signes, attributs, etc.

Dans ce dispositif, les lettres ou signes sont simulés sur une plaque translucide ou transparente en verre, celluloïd, etc., sur laquelle, à la façon connue, les parties extérieures aux contours des lettres sont rendues opaques de façon quelconque, et les contours de chaque lettre ou signe sont accentués par l'application sur la face d'avant de la plaque translucide, d'une bordure, soit métallique, soit en bois ou matière quelconque, ornée ou décorée, entre les contours de laquelle sont réservés des espaces vides.

Les figures 1 et 2 du dessin ci-joint représentent à titre d'exemple deux formes de lettres établies d'après ce principe.

La figure 3 représente à titre d'exemple une boîte sur laquelle est montée une lettre, la figure 4 étant une coupe transversale de la figure 3, et figure 5 montre en vue de face une boîte portant un motif complet.

En se reportant aux figures 1 et 2, on voit

que le dispositif comprend une plaque de verre ou autre matière translucide (a), avec bordure (b) limitant les contours de la lettre, constituée par une baguette soit métallique et émaillée, soit en bois ou autre matière, peinte ou décorée de façon quelconque, entre les contours de laquelle sont réservés des espaces transparents (c), tandis que le reste de la plaque est rendu opaque de toute façon convenable.

S'il s'agit de constituer des motifs non lumineux, les lettres ou signes qui les composeront seront figurés sur une ou plusieurs plaques de verre assemblées et montées sur un panneau de la façon ordinaire.

Pour former des motifs lumineux composés de lettres séparées, on utilisera pour chaque lettre par exemple des boîtes figures 3 et 4, comprenant un cadre en métal ou en bois (d) avec rebord intérieur (e) maintenant la plaque (a) qui porte la lettre, et fond (f) s'il s'agit d'une lettre à simple face. La plaque (a) pourra être maintenue en avant par un cadre (g) s'emboîtant sur le cadre (d) et portant des ressorts (h) qui font pression contre le verre pour le maintenir fixe pendant le transport. Le cadre (g) est maintenu sur une ou plusieurs faces soit par des crochets de fermeture (i) passant dans des encoches *ad hoc*, et pouvant être rabattus, soit de toute autre façon. On pourrait aussi faire en sorte que la plaque

la lettre fût assujettie au cadre de devant s'emboîtant alors dans la boîte elle-même par éviter toute saillie extérieure. Dans un cas comme dans l'autre, l'interchangeabilité des lettres ou signes sera facile à obtenir sans avoir à toucher à la boîte elle-même, mais seulement à son couvercle.

Pour les lettres à double face, le fond (f) est supprimé et la deuxième face est disposée comme celle précédemment décrite.

En faisant des boîtes de dimensions convenables, on pourra disposer à côté l'une de l'autre plusieurs plaques (a) pour constituer un mot ou un motif, ou au besoin employer une seule plaque de verre qui recevra toutes

les lettres et portera un cadre de face qui sera retenu par un des moyens indiqués plus haut par exemple, figure 5. La source lumineuse sera en tous cas quelconque et disposée à l'intérieur de chaque boîte de toute façon connue.

EN RÉSUMÉ, je revendique un dispositif de lettres et motifs pour enseignes, lumineux ou non et interchangeables ou non, tel que décrit ci-dessus en principe et représenté à titre d'exemple au dessin annexé.

HUGUES BOLDÈS.

Par procuration :
RIGOT et PRÉVOST.

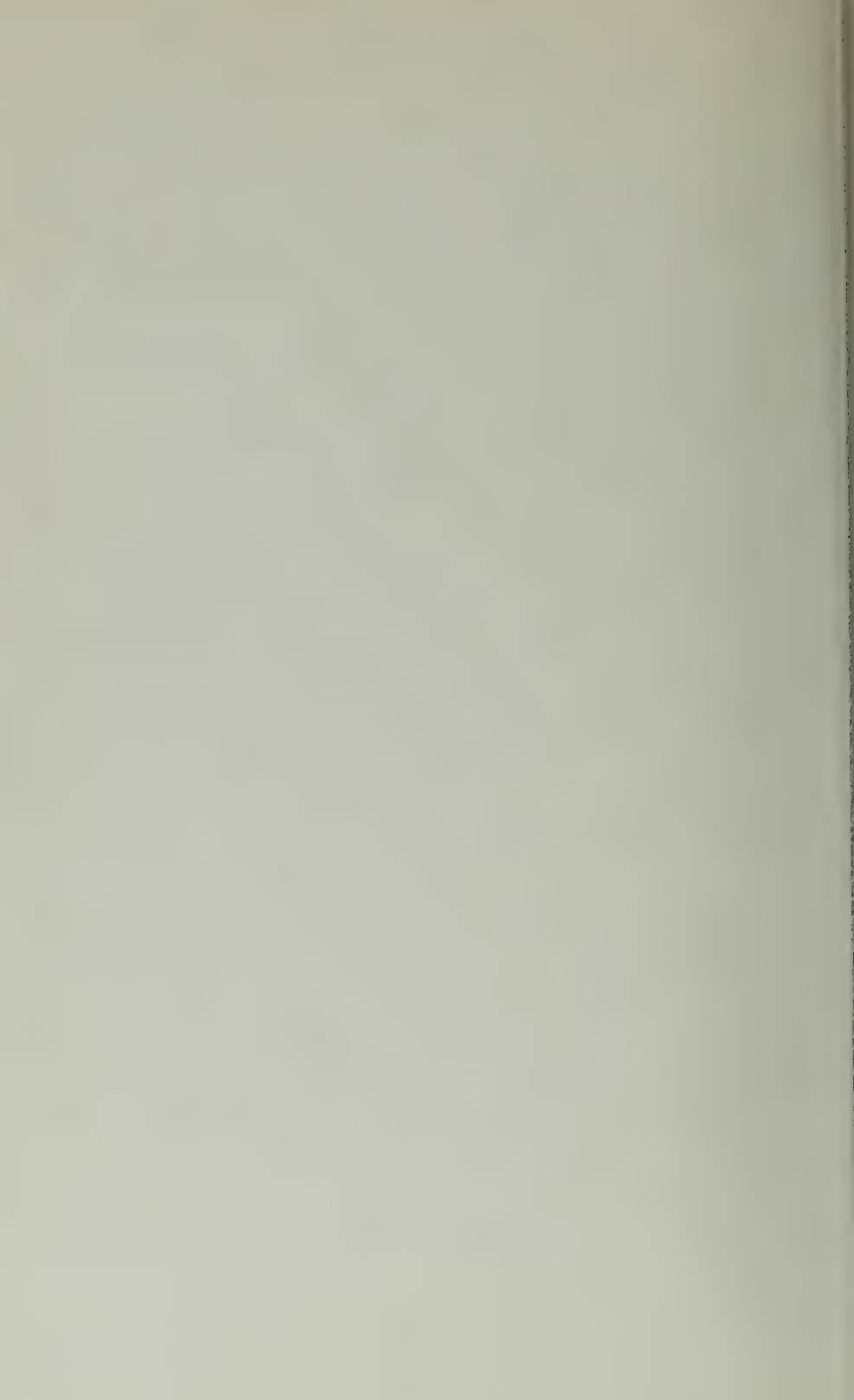


Fig. 1

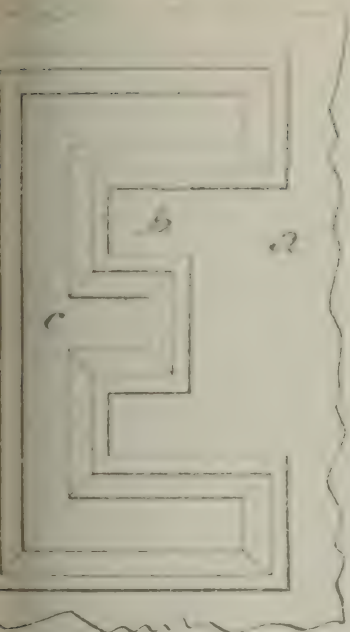


Fig. 2



Fig. 3.

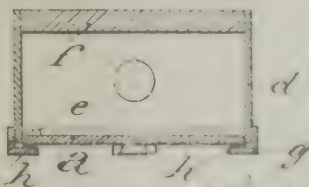


Fig. 4.

Fig. 5.



Translation of French Patent #335943, to Boldés.
Letters for Signs.

(Appl'd for Sep. 17, 1903, iss'd Dec. 22, 1903, publ'd
Feb. 20, 1904.)

The present invention refers to a new arrangement of letters for signs. Such letters may be luminous or not, may be mounted together on glass panes, or so as to constitute elements with separate boxes, one, two or three-faced. These elements may be interchangeable, too, and the principle of this mode of construction is also applicable to design elements, signs, symbols, &c.

In the present arrangement, the letters or signs are reproduced on a translucent or transparent plate of glass, celluloid, &c., on which the portions without the outlines of the letters are, in known manner, made opaque in any way, and the outlines of any letter or sign are emphasized by applying, on the front face of the translucent plate, a border of metal, wood or any material, ornamented or decorated, between the outlines of which empty spaces are left.

Fig. 1, 2 of the accompanying drawing represent, by way of example, two forms of letters designed in accordance with this principle. Fig. 3 represents, by way of example, a box with a letter mounted on it; fig. 4 being a cross-section of fig. 3. Fig. 5 is a front view of a box with a complete legend.

It is seen, by reference to fig. 1, 2, that the arrangement comprises a plate of glass or other trans-

lucent material *a* with a border *b* bounding the outlines of the letters and consisting of a strip either of metal and enameled, or of wood or other material painted or decorated in any way, between the outlines of which there are left transparent spaces *c*, while the remainder of the plate is made opaque in any suitable way. If non-luminous mottos are to be designed, their constituent letters or signs are reproduced on one or more assembled glass plates and mounted on a pane in the usual way. To assemble luminous mottos consisting of separate letters, for each letter a box, e. g. like fig. 3, 4, will Fr. Pat. 335943

be used, comprising a metal or wooden frame *d* with inner flange *e* to hold the letter-bearing plate *a*, and a back for an one-faced letter. At the front, the plate *a* may be held by a frame *g* fitting about the frame *d* and carrying springs *h* to press against the glass and hold it in position during transportation. Frame *g* is held on one or more sides by hook closures engaging special notches and capable of being thrown open; or in any other way. The plate with the letter, too, might be held in the front frame and be set in the box itself, to avoid protruding on the outside. In either case, the possibility of exchanging letters or signs without having to touch the box but only its cover, is easily obtained.

For two-face letters, the back *f* is omitted and the second face designed as that described above. By making the boxes of *a* suitable dimensions, several plates *a* may be set side by side to make up a word or legend, or if necessary, a single glass

plate may be used to hold all the letters, and will have a front frame held by the means above described, e. g. in fig. 5. The source of light may be of any kind in all these cases, and will be placed within each box in any known manner.

In sum, I claim an arrangement of letters and designs for signs, luminous or otherwise, interchangeable or otherwise, such as hereinbefore described in principle and represented in the accompanying drawing, by way of example.

Fr-E/tr:PW.

Mar. 16, 1921.

9120.

Defendants' Exhibit "J."

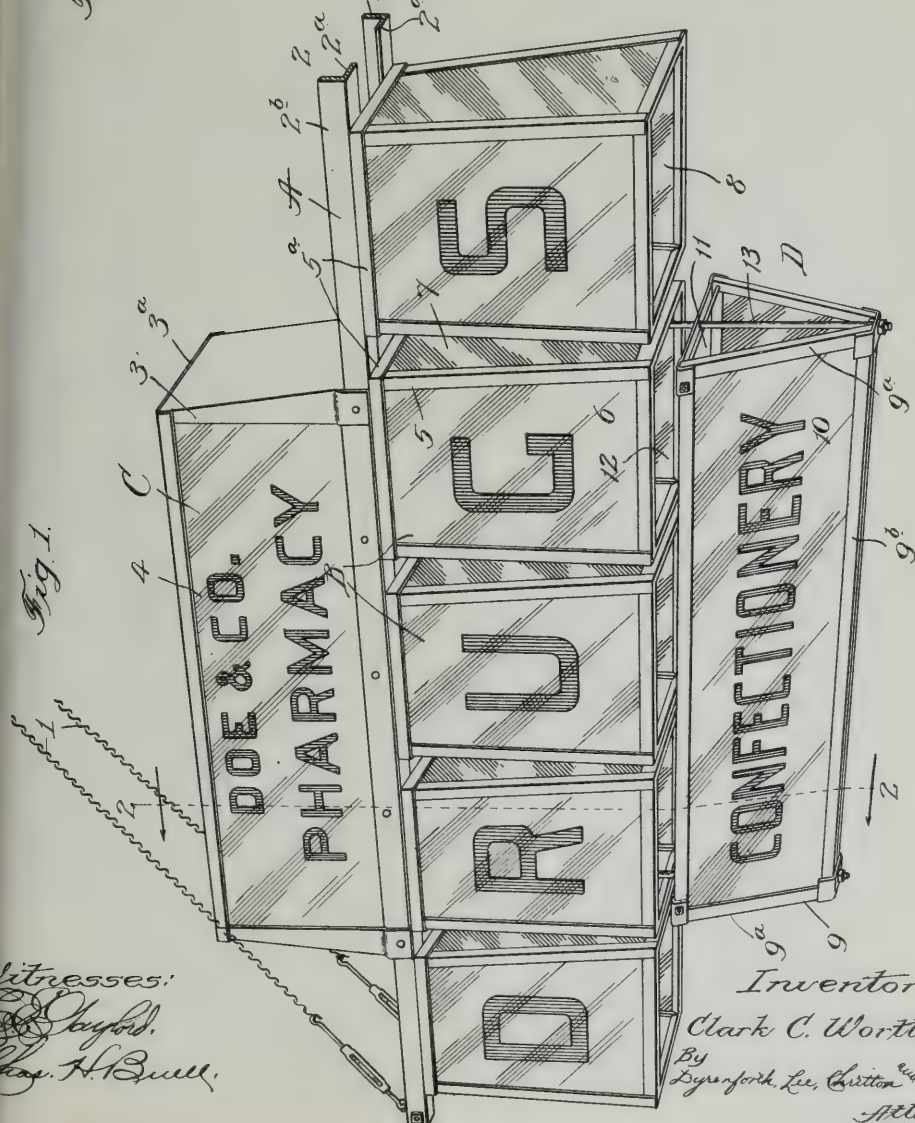
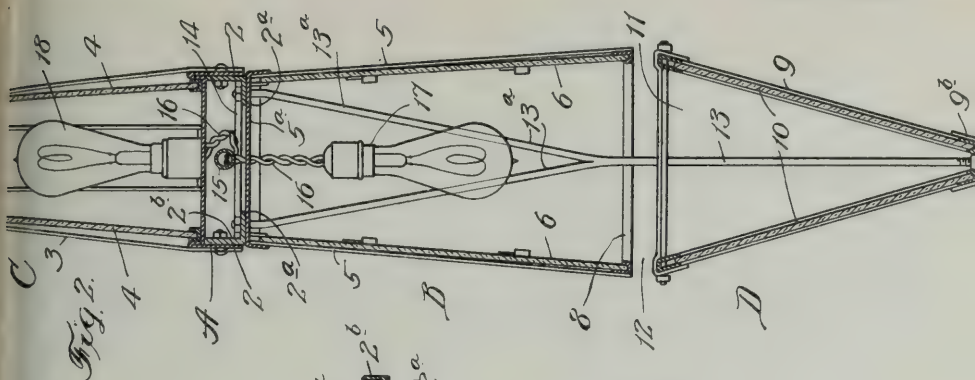
[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "J." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

1,128,741.

Patented Feb. 16, 1915.

2 SHEETS—SHEET 1.



Witnesses:

By *Clark C. Wortley*
Clark C. Wortley
Clark C. Wortley

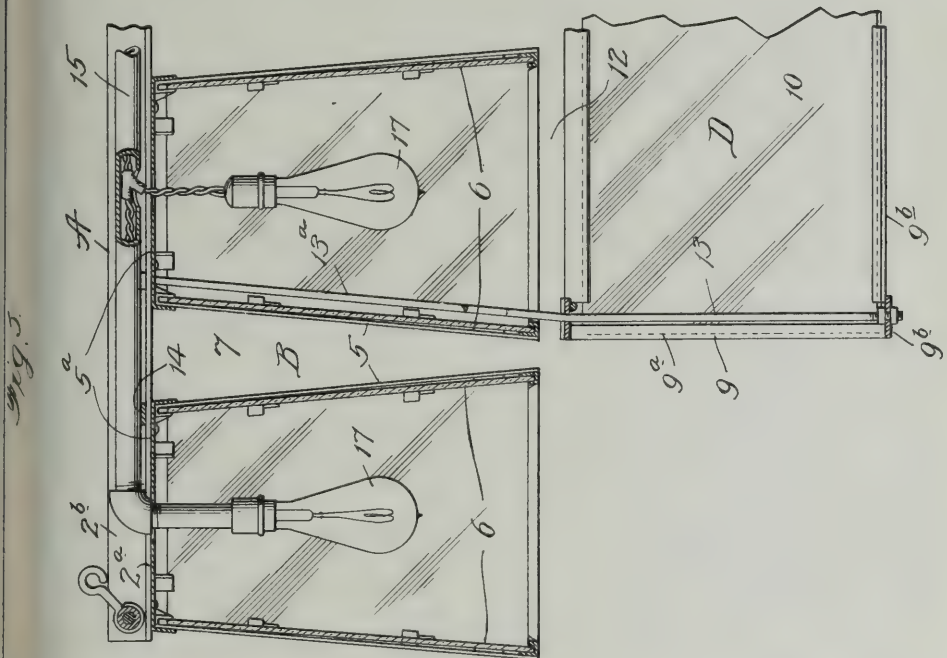
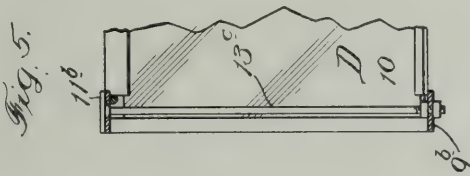
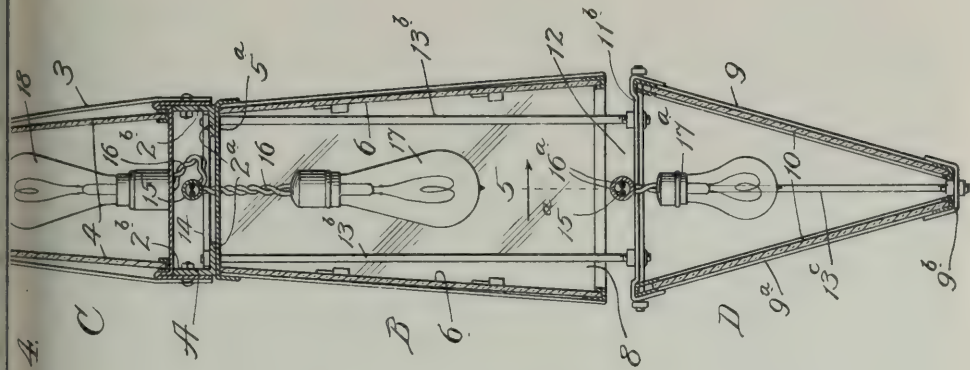
Inventor:

Clark C. Wortley,
 By *Dyerforth, Lee, Christen & Wilcox*
Attys.

,128,741.

Patented Feb. 16, 1915.

2 SHEETS—SHEET 2.



Witnesses:

W. H. Clifford.
Chas. H. Buell.

Inventor:

Clark C. Wortley,

By Dyrenforth, Lee, Chilton and Wilson,
Attys. at L.

CLARK C. WORTLEY, OF CHICAGO, ILLINOIS.

SIGN.

1,128,741

Specification of Letters Patent.

Patented Feb. 16, 1915.

Application filed May 12, 1913. Serial No. 787,212.

To all whom it may concern:

Be it known that I, CLARK C. WORTLEY, a citizen of the United States, residing at 175 Dearborn street, Chicago, in the county of Cook and State of Illinois, have invented new and useful Improvements in Signs, of which the following is a specification.

This invention relates particularly to signs adapted for street purposes and provided with illuminating means; and the primary object of the invention is to provide an improved arrangement of construction, possessing certain advantages of use and presenting a pleasing appearance.

The invention is illustrated in the preferred embodiment in the accompanying drawings, in which—

Figure 1 represents a broken perspective view of a sign constructed in accordance with my invention; Fig. 2, a broken vertical section taken as indicated at line 2 of Fig. 1; Fig. 3, a broken longitudinal section; Fig. 4, a sectional view similar to Fig. 2 showing a modification of the construction; and Fig. 5, a broken vertical section taken as indicated at line 5 of Fig. 4.

Referring to Figs. 1 to 3 inclusive, the construction comprises a horizontally disposed frame A, which may be connected with a building in any suitable manner and also supported by chains 1; a series of illuminable sign-sections, or panel-equipped devices B depending from the frame A; an illuminable sign-section, or panel-equipped illuminable device C surmounting the frame A; and an illuminable sign-section, or panel-equipped illuminable device D suspended beneath the devices B.

The frame A may be of any suitable construction. It preferably comprises horizontally disposed angle-bars 2 constituting the foundation framework for the whole structure. The angle-bars 2 have returned flanges 2^a and upturned flanges 2^b.

The device C comprises a frame 3 connected with the vertical flanges 2^b and including a top member 3^a. The device C is equipped with transparent panels 4 which may be made removable in any desired manner.

Illuminable devices B are designed to afford individual panels for letters. Each device B comprises a frame 5 equipped with transparent panels 6 which are made removable in any preferred manner. The devices B are horizontally aligned and are sep-

arated by spaces 7. Said devices B are open at their bottoms, as indicated at 8. The devices B also have their panels slightly convergent upwardly.

The device D comprises an open frame 9 having downwardly convergent sides fitted with transparent panels 10 which may be made removable in any desired manner. The frame 9 includes substantially triangular end-frames 9^a and connecting member 9^b. The frames 5 of the devices B have top members 5^a which are securely joined to horizontal flanges of the angle-bars 2. The horizontally elongated device D preferably has its upper side open as indicated at 11 and disposed just below the intermediate ones of the devices B, being separated therefrom by a space 12. The device D is supported by rods 13, whose lower ends are connected with the frame-member at the bottom of the device D, while their upper ends divide into branches 13^a which are connected with the horizontal flanges of the angle-bars 2.

The horizontal flanges 2^a of the angle-bars 2 are connected at intervals by cross-bars 14 which serve to support a horizontally disposed conduit 15 which carries electric conductors 16. The conductors 16 serve to supply current to the lamps 17 located in the device B and the lamp or lamps 18 located in the device C.

It will be noted that by reason of the upward divergence of the panels 10 of the device D and the disposition of the device D with relation to the devices B, light will be supplied from the lamps 17 for the device D; also the devices B serve to shield the device D from rain to a considerable extent; also, the arrangement is such that in the daytime light will be admitted freely to the interior of the devices B and D. It will also be noted that the device D being open at its top the light from the lamps 17 in the devices B will illuminate the diverging panels of the device D, thus effecting a maximum illuminated sign surface with the minimum of illuminating cost. A further advantage resulting from the device D being constructed with an open top and open ends and suspended in spaced relation to the devices B is that the skeleton-like frame thus produced offers diminished surface to wind pressure, thus rendering the structure less liable to damage therefrom.

The panels of the several illuminable de-

vices may be lettered or provided with suitable designs, as, for illustration, in the manner shown in Fig. 1.

The construction shown in Figs. 4, and 5 is similar to the construction already described, and the corresponding parts are similarly designated. The construction is modified to the extent of providing a conduit 15^a above the central portion of the device D and serving to contain conductors 16^a which supply a lamp or lamps 17^a disposed in the device D. In this construction, the frame of the device D is suspended by vertically disposed bolts 13^b, while the cross-members 11^b at the top of the frame of the device D are of such substantial construction as to afford an adequate support for the conduit 15^a and the body of the device D. The frame of the device D is further reinforced in this construction by employing vertical rods 13^c which connect the upper and lower frame-members of said device, as will be better understood from Fig. 5.

The construction described is cheap, durable, presents a pleasing appearance, and is economical in maintenance.

The foregoing detailed description has been given for clearness of understanding only, and no unnecessary limitations should be understood therefrom, but the appended claims should be construed as broadly as permissible, in view of the prior art.

What I claim as new and desire to secure by Letters Patent is—

1. In a sign, the combination of a substantially horizontal frame, a series of alined chambers depending therefrom and having transparent panels, illuminating means in said chambers, a horizontally elongated

frame open at its top and ends suspended beneath said chambers in alinement therewith and in spaced relation thereto, and transparent side panels carried by said elongated frame forming an elongated chamber, whereby said lower panels are illuminated by the illuminating means in said upper chambers.

2. In a sign, the combination of a substantially horizontal frame, a series of alined chambers depending therefrom, and having upwardly converging transparent panels, and open lower ends, illuminating means in said chambers, and a horizontal elongated frame suspended beneath said chambers in alinement therewith and in spaced relation thereto, and having upwardly diverging transparent panels, forming an elongated chamber open at its top, whereby said lower panels are illuminated by the illuminating means in said upper chambers.

3. In a sign, the combination of a horizontal frame, a series of alined chambers suspended therefrom open at their bottoms and equipped with transparent panels, illuminating means in said chambers, an elongated device beneath said chambers in alinement therewith and in spaced relation thereto, comprising an elongated frame and transparent upwardly divergent panels forming a chamber open at its top, and rods connecting said upper and lower frames, whereby the panels of said lower device are illuminated by the illuminating means in said upper chambers.

CLARK C. WORTLEY.

Witnesses:

L. HEISLAR,
E. D. TEULE.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

Defendants' Exhibit "K."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "K." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monekton, Clerk.

Fig. 1. 3

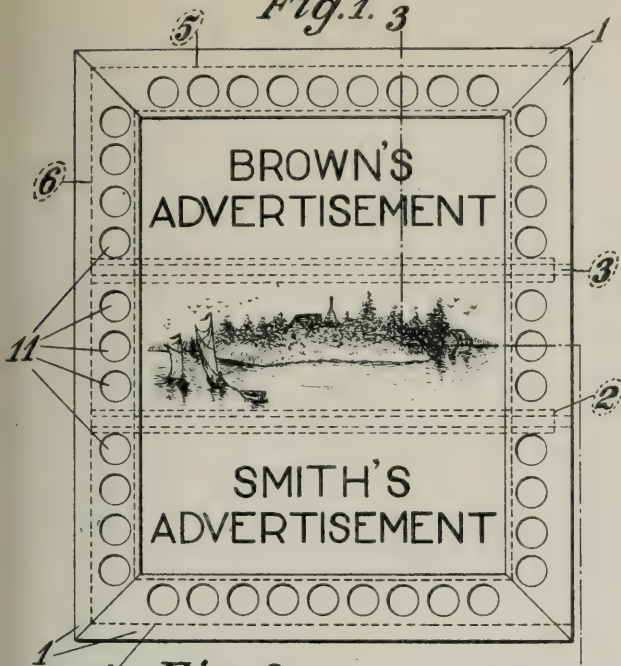


Fig. 3.

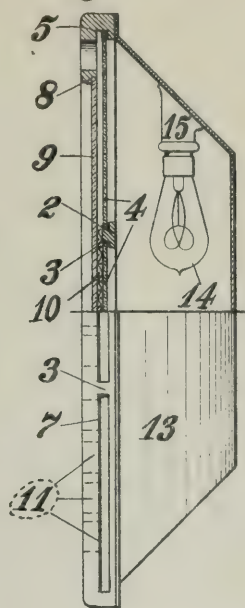


Fig. 2.

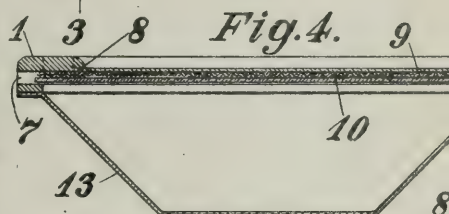
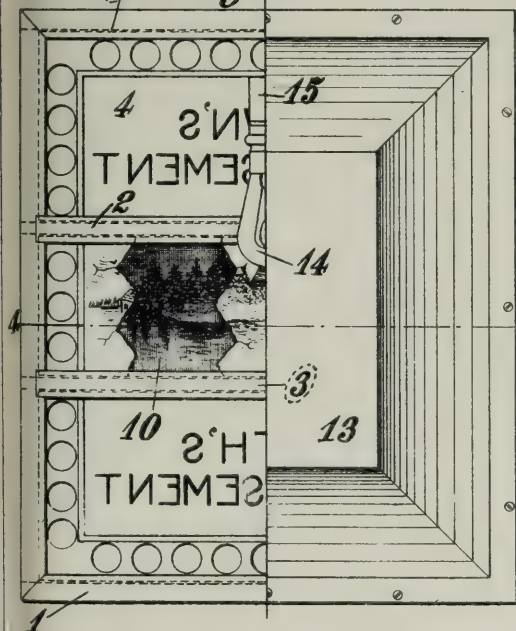
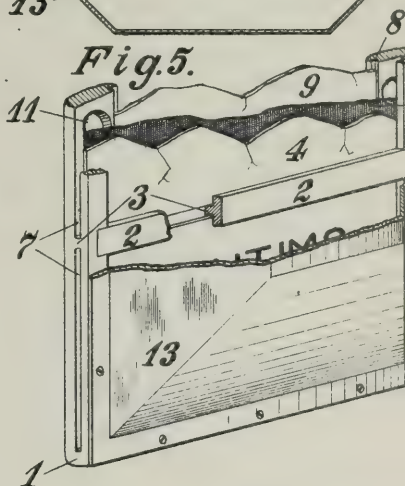


Fig. 5.



Witnesses:
 Gladys Walton.
 Geo. J. Anderson.

Inventor
 George L. Thorne
 By Hugh N. Wagner
 Attorney

UNITED STATES PATENT OFFICE.

423

GEORGE L. THORNE OF ST. LOUIS, MISSOURI, ASSIGNOR OF ONE-HALF TO
M. J. POPE AND ONE - HALF TO FRANK D. THORNE, OF ST. LOUIS,
MISSOURI.

ADVERTISING DEVICE.

No. 854,779.

Specification of Letters Patent.

Patented May 28, 1907.

Application filed January 25, 1906. Serial No. 297,872.

To all, whom it may concern:

Be it known that I, GEORGE L. THORNE, a citizen of the United States, residing at the city of St. Louis and State of Missouri, have invented certain new and useful Improvements in Advertising Devices, of which the following is a specification, reference being had therein to the accompanying drawing.

This invention relates to advertising devices, especially to that kind in which rays of light are caused to shine through transparent or translucent material or through openings in opaque material on which the advertisement is displayed, and relates particularly to the manner of arrangement of the frame and slides bearing the advertisements, etc.

In the accompanying drawings forming part of this specification, in which like numbers of reference denote like parts wherever they occur throughout the several views, Figure 1 is a front view of the device; Fig. 2 is a rear view, part of the reflector being removed, leaving the advertising and pictorial matter exposed; Fig. 3 is a side elevation partly in section on the line 3—3, Fig. 1. Fig. 4 is a transverse sectional view on the line 4—4, Fig. 2. Fig. 5 is a fragmentary perspective view of the rear of the device, partly broken away.

The various parts are mounted in connection with a frame consisting of upright and horizontal panels 1. Extending transversely across the rear of the frame and mounted in the vertical panels are cross-pieces 2 which are provided with ribs 3 on which the panes of glass 4 can slide. The top and bottom panels 1 have grooves 5 therein, also adapted to hold the panes 4. One of the vertical panels is provided with grooves 6 in which the ends of the panes 4 can fit, while the opposite panel is slotted at 7. Each pane 4 is inserted through a slot 7, each of said slots being rendered independent of its neighbor by the intervention of rib 3, and rests in the groove 5 of the lower cross-panel, or on ribs 3 of the cross-pieces 2, or fits into the groove 5 in the upper cross-panel, and each one extends into its appropriate groove 6, so that each pane 4 is held snugly in place, but can be removed easily by withdrawal through its slot 7. In the drawings I have shown two cross-pieces 2, which would divide the frame into three portions and allow the use of three panes of glass 4, but it is obvious that any desired number of

cross-pieces can be used and the number of divisions changed accordingly.

Fitting on a shoulder 8 in the frame may be a protecting pane of glass 9, which is large enough to cover the entire opening in the front of the frame. The sliding panes 4 with the pictorial or advertising matter thereupon are inserted behind this large pane 9. As the panes 4 are readily removable sidewise through the slots 7, it will be seen that this matter can be changed just as frequently as desired. In Figs. 2, 3, and 4 I have shown a screen 10 made of any translucent material, on which the pictorial matter can be placed, instead of being on the pane 4. This screen may be inserted between the large front pane 9 and the sliding pane 4, the latter as well as the former then constituting protection for the screen.

In the panels 1 may be a plurality of perforations 11, said panels being made extra wide, in which advertising matter can be placed. A reflector 13 is secured to the outer edges of panels 1 of the frame, so that the perforations 11 are entirely within the confines of the reflector. Inside of the reflector is an incandescent lamp 14 of any ordinary type, mounted on a thermostat 15, which causes the lamp 14 to flash intermittently.

The operation of the device is as follows: As the reflector is mounted so that it entirely covers all of the openings through the panels, when the lamp 14 is turned on the rays of light will shine through the openings 11 in the panels, as well as through the panes 4, thus prominently displaying the advertising or pictorial matter upon said panes or upon the screen 10. When it is desired to change the matter all that is necessary is to remove one of the panes 4 and insert another one in its place, or to change screen 10 for another screen on which a different picture is found. The pictorial matter is placed in the frame merely to attract attention to the advertisements, and the intermittent flashing of the lamp also helps make the device more noticeable.

Having thus described my said invention what I claim and desire to secure by Letters Patent is:

1. In a device of the character described, the combination of a frame composed of panels, cross-pieces mounted in said panels, a plurality of panes of glass supported by said

panels and cross-pieces, a pane fixed in said frame covering and protecting said other panes, and a translucent screen disposed between the large and the small panes.

2. In a device of the character described, the combination of a frame composed of panels, a fixed front pane resting within said panels, a sliding rear pane and a translucent screen disposed between the two panes, a reflector mounted on said panels, and a lamp within the reflector, whereby rays of light are diffused through the panes and the screen.

3. In a device of the character described, the combination of a frame composed of panels, one of which is slotted, cross-pieces mounted in said panels, a plurality of panes on which advertising matter is placed supported by said panels and said cross-pieces, and a translucent screen placed between two of said advertising panes.

4. In a device of the character described, the combination of a main frame composed of panels, a plurality of cross-pieces mounted therein and serving to divide said frame into independent sections, a translucent screen displayed in one of said sections, and a plurality of separately-removable advertising panes displayed in the remaining sections, said panes being supported by said cross-pieces and said panels.

5. In a device of the character described, the combination of a main frame, a plurality of cross-pieces mounted therein and serving to divide said frame into independent sections, a translucent screen displayed in one of said sections, a plurality of separately-removable advertising panes displayed in the remaining sections, a reflector secured to said frame, and a lamp within the reflector, the lamp being so arranged that the rays of light

shine through said translucent screen and each of said panes.

6. In a device of the character described, the combination of a main frame composed of panels, the center opening of said frame being divided into a plurality of independent sections, a translucent screen displayed in one of said sections, a plurality of advertising panes displayed in the remainder of said sections, and a large pane covering and protecting all of said sections.

7. In a device of the character described, the combination of a main frame, a pictorial screen fixed in one section thereof, and advertising panes removably displayed in other sections thereof, said panes and said screen being independent of each other.

8. In a device of the character described, the combination of a main frame, a constantly-exhibited translucent screen, and a plurality of separately-removable advertising panes displayed in portions of said main frame not covered by said screen.

9. In a device of the character described, the combination of a frame composed of perforated panels, one of which is slotted, cross-pieces mounted in said panels, a plurality of sliding panes on which advertising matter is placed supported by said cross-pieces, and a translucent screen displayed midway between two of said advertising panes, said panes being displayed through both the opening in the center of said panels and through the perforations therein.

In testimony whereof I have affixed my signature in presence of two witnesses.

GEORGE L. THORNE.

Witnesses:

HUGH K. WAGNER,

FRANK D. THORNE.

Defendants' Exhibit "L."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "L." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

923,769.

Patented June 1, 1909

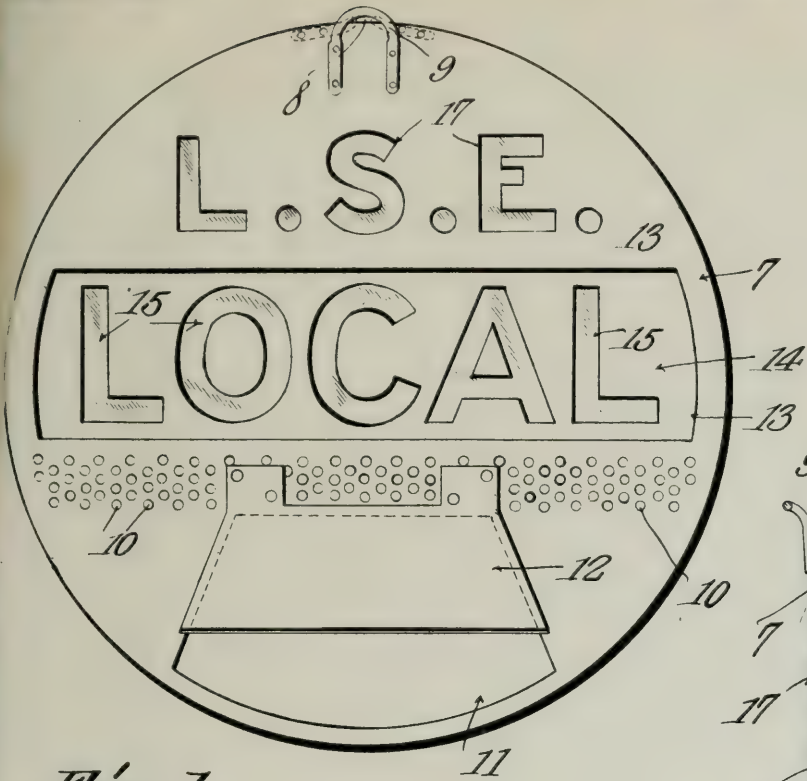
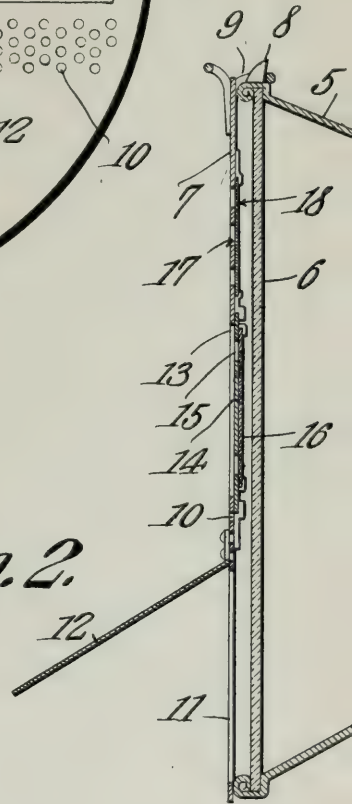


Fig. 1.

Fig. 2.



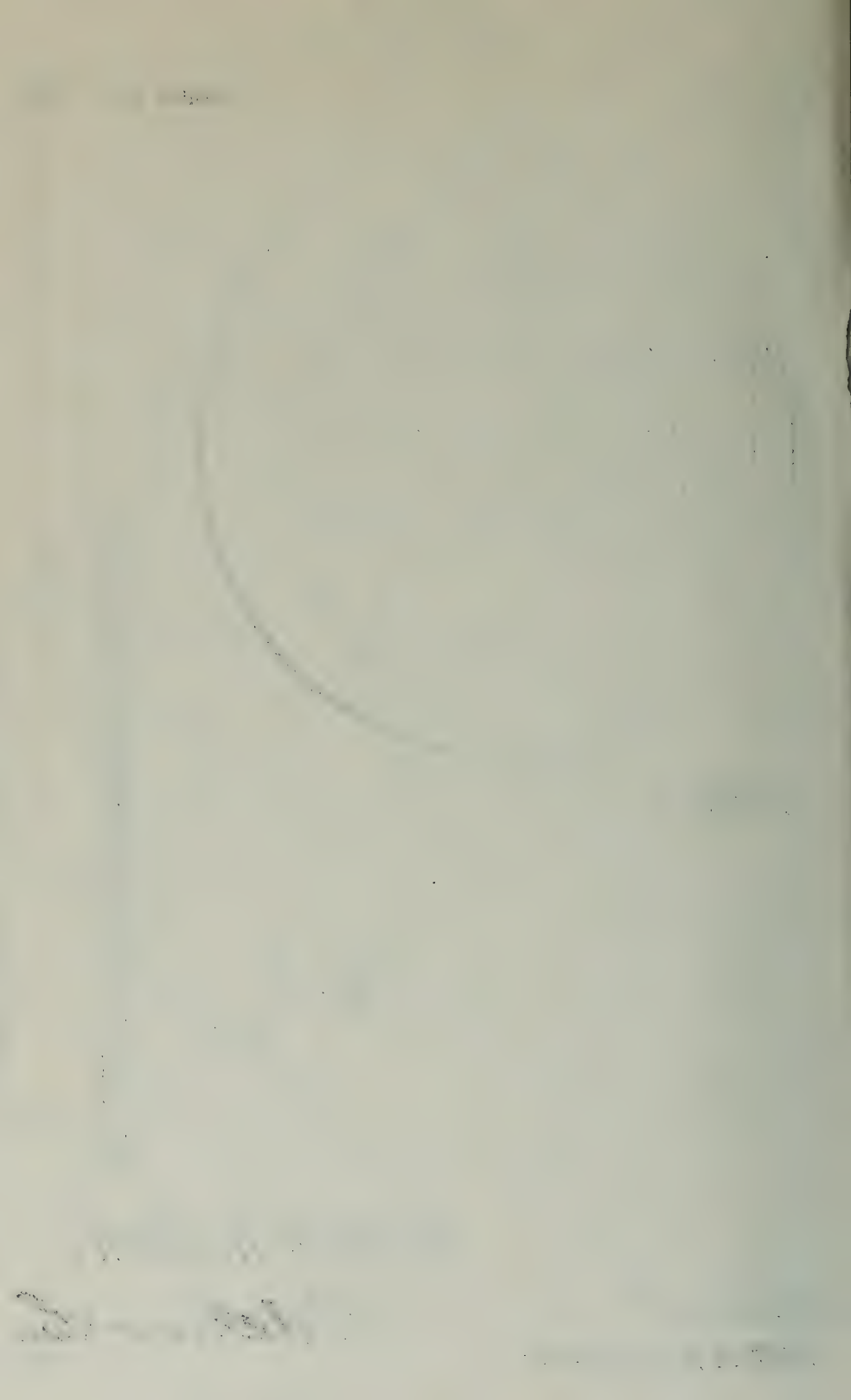
Witnesses

E. J. Howard
M. Schmidt

Richard W. Clark.

By *C. A. Snow*
Attorney

Inventor



RICHARD WORTHINGTON CLARK, OF FREMONT, OHIO.

DIMMER FOR HEADLIGHTS.

No. 923,789.

Specification of Letters Patent.

Patented June 1, 1909.

Application filed February 8, 1909. Serial No. 476,789.

To all whom it may concern:

Be it known that I, RICHARD W. CLARK, a citizen of the United States, residing at Fremont, in the county of Sandusky and State of Ohio, have invented a new and useful Dimmer for Headlights, of which the following is a specification.

This invention is a device to be used in connection with the headlight of interurban electric cars, by means of which the rays of light may be dimmed when the car is passing through city streets.

The object of the present invention is to provide a device of this kind which can be readily applied to the ordinary electric headlights now in use, and also to provide the device with means for displaying the name of the operating company or other information.

Another object of the invention is to provide a dimmer which throws a dim light straight ahead, and also one in which a portion of the rays of light are left unobstructed, and thrown downwardly on the track so that the motorman may observe the condition thereof.

With the foregoing objects in view the invention consists in a novel construction and arrangement of parts to be hereinafter described and claimed, reference being had to the drawing hereto annexed in which:—

Figure 1 is a front elevation of the invention. Fig. 2 is a central vertical section thereof.

In the drawings, 5 denotes the casing of an electric headlight of that kind employed on electric or other cars, and 6 is the glass door thereof through which the rays of light are thrown by the reflector. I have not illustrated the lamp nor the reflector as they form no part of this invention, the latter being constructed so that it may be applied to any ordinary electric headlight.

The dimmer comprises a plate 7 of sheet metal, or other suitable opaque material so that when placed in front of the door 6, the rays of light will be interrupted. The plate is circular, or of any other shape to correspond to the outline of the door 6, and it is hung on a lug 8 secured to the casing 5, and engageable with a loop 9 attached to the plate. In order that the rays of light may not be entirely interrupted, the plate 7 is provided with a plurality of perforations 10. These perforations are arranged in a group extending horizontally in a straight line across the plate below the horizontal median

line thereof as clearly shown in Fig. 1 of the drawing. By means of these perforations, the rays of light from the lamp are dimmed or subdued.

Below the group of perforations 10, the plate 7 has an opening 11 from the upper end of which projects a deflector plate 12. This plate is secured to the plate 7 in any suitable manner, and extends forwardly therefrom, and is also inclined downwardly, so that the rays of light passing through the opening 11 will be thrown on the track, the inclination of the plate 12 being such, that the rays are thrown a suitable distance in front of the car. The rays of light passing through the opening 11, are not dimmed, and a powerful light is therefore thrown on the track a suitable distance ahead of the car which enables the motorman to observe the condition thereof. The rays of light passing through the perforations 10 are thrown straight ahead.

Above the perforations 10, the plate 7 has an opening 13 in which is mounted a slide 14 comprising a plate in which are cut letters 15 which constitute a sign indicating whether the car is a local, limited, or special. It is obvious that the sign may display any other information. The plate 14 is also opaque, and the openings 15 forming the letters of the sign are covered by a sheet 16 of transparent or translucent material such as celluloid, glass, etc. By providing the hereindescribed slide, the same may be readily removed from the plate 7 and another one substituted containing different information.

Above the opening 13, letters 17 are cut in the plate 7, which letters may be the initials indicating the name of the operating company. Of course, any other information may be displayed. The openings forming these letters, are also covered by a transparent or translucent sheet 18.

By the construction herein described, the dimmer is also made to serve as an illuminated sign, the light visible through the translucent or transparent sheets covering the openings 15 and 17 forming the letters thereof. The sheets may be of any desired color.

It will be understood that the device is to be used only when the full rays of the headlight are objectionable or unnecessary, as when the car is passing through a town or city. Outside the city the dimmer will be removed, in order that the headlight will be entirely unobstructed.

The dimmer is extremely simple in construction, and therefore can be cheaply produced. It can also be readily applied to any ordinary headlight, and it effectually serves the purpose for which it is designed. The openings 10 provide enough light for city traffic, and by the opening 11, and the deflector 12, a beam of light is thrown downwardly on the track, and the same is illuminated sufficiently for the motorman to observe the condition thereof.

What I claim is.

1. A dimmer for headlights comprising an opaque plate having an opening, and a perforated portion, and a slide mounted in said opening, said slide being provided with open-

ings forming the letters of an illuminated sign.

2. A dimmer for headlights comprising an opaque plate having a group of perforations extending horizontally across its face below the horizontal median line thereof, and said plate having below said group of perforations an opening, and a deflector secured to the plate above said opening.

In testimony that I claim the foregoing as my own, I have hereto affixed my signature in the presence of two witnesses.

RICHARD WORTHINGTON CLARK.

Witnesses:

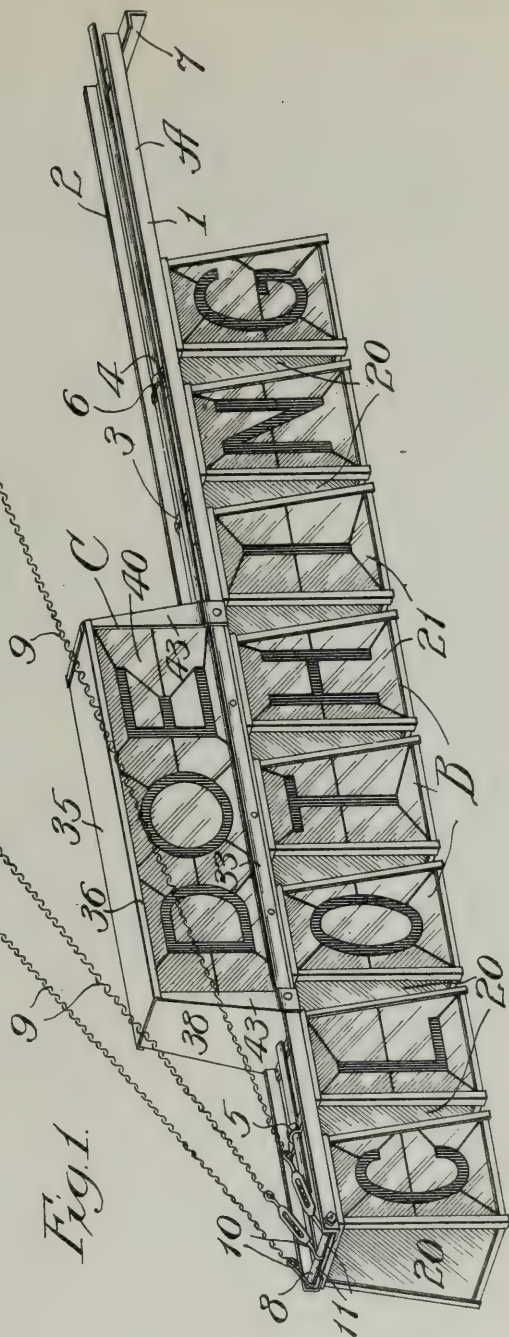
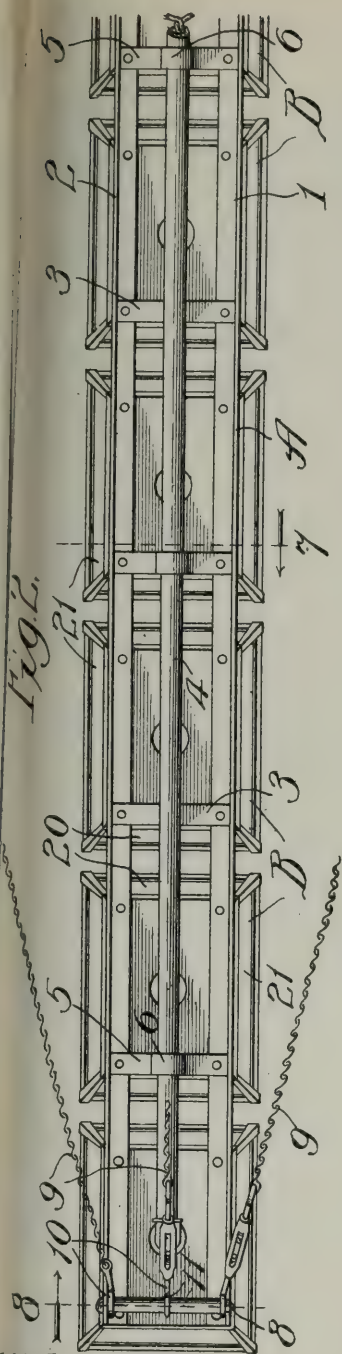
H. C. DE HAN,
BERT HOLMES.

Defendants' Exhibit "M."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "M." Filed 12/6/21. Maling, Clerk.

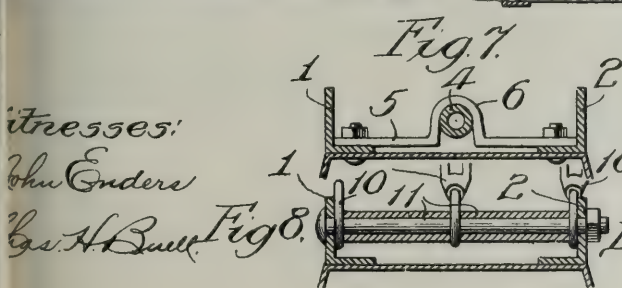
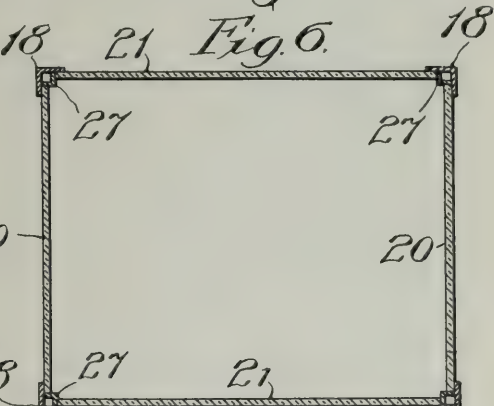
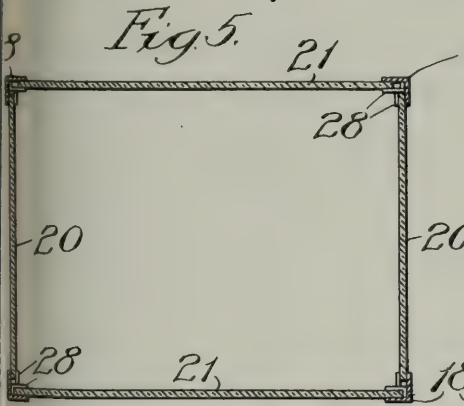
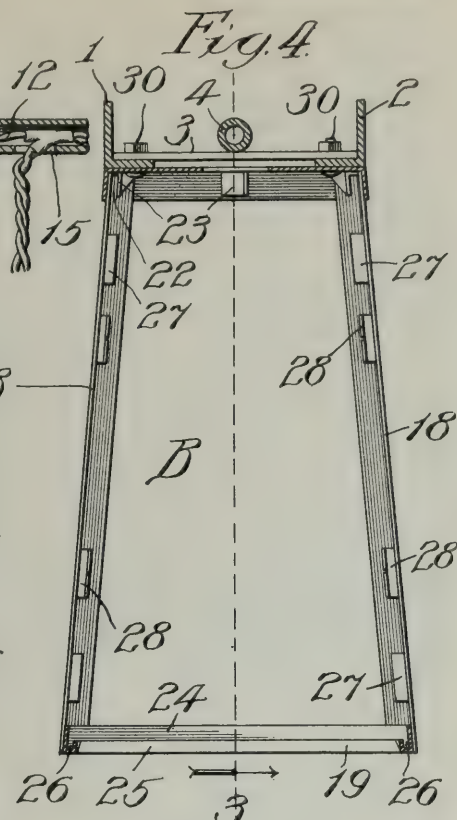
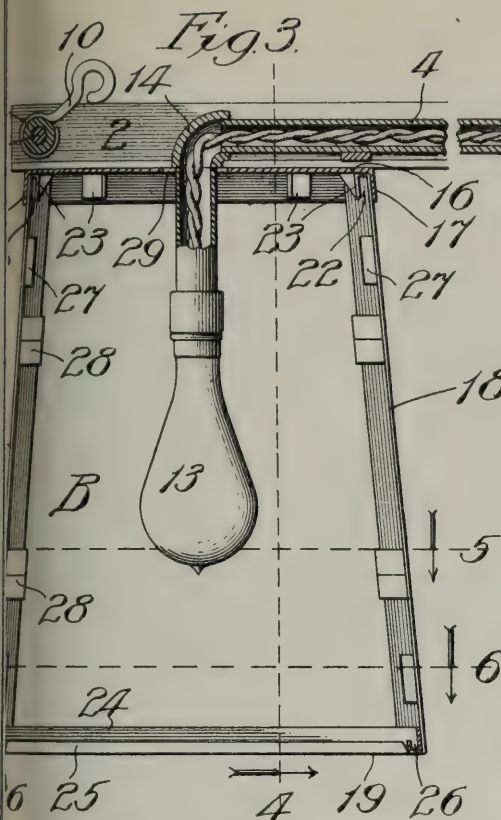
No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.





Witnesses:
 John Enders
 Chas. H. Quill.

Inventor
 Clark C. Wortley.
 By *Spencer, Lee, Christy & Miles*
 Attys.



Inventor:
Clark C. Wortley.
By Syreusforth, Lee, Chritton & Wiles
Attys.

Fig. 9.

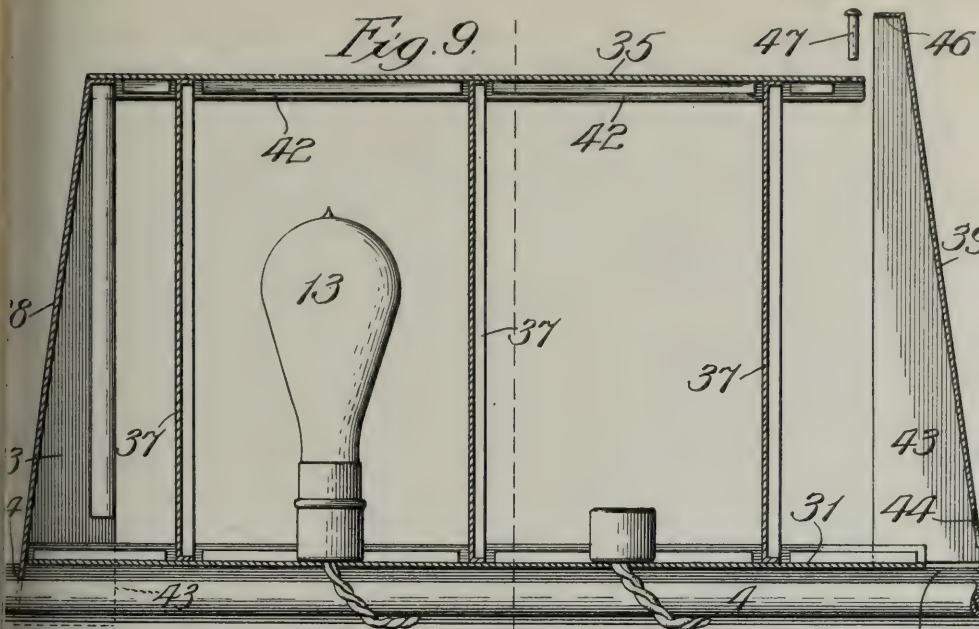


Fig. 10.

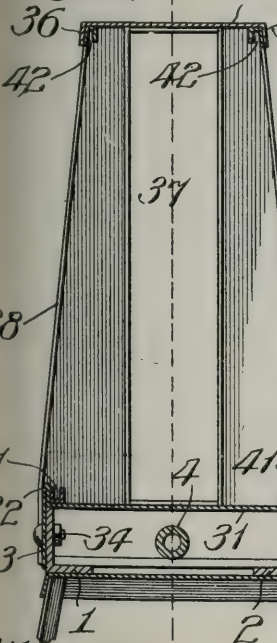


Fig. 11.



Fig. 13.

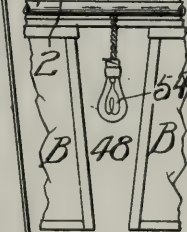


Fig. 14.

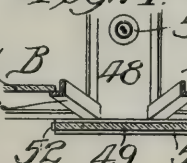
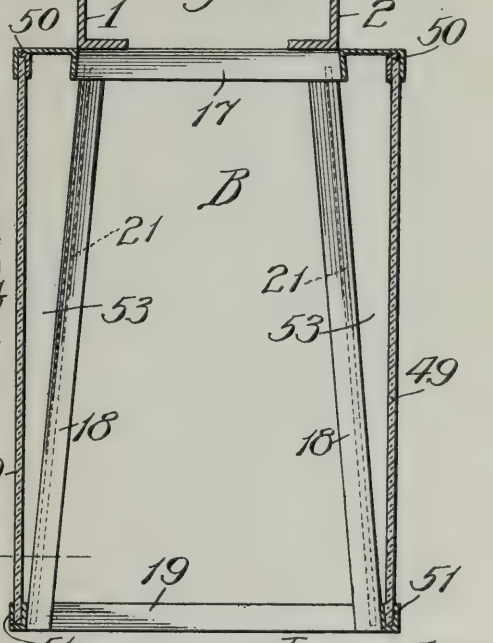


Fig. 12.



Witnesses:

John Enders
Chas. H. Buell.

21. B
18
52 49 51 52

Inventor.

Clark C. Wortley.

By *sydney* *forth*, *Lee*, *Christen* & *Wiles*
Attys.

CLARK C. WORTLEY, OF CHICAGO, ILLINOIS.

SIGN.

589,593.

Specification of Letters Patent.

Patented Feb. 7, 1911.

Application filed January 6, 1909. Serial No. 470,912.

To all whom it may concern:

Be it known that I, CLARK C. WORTLEY, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented a new and useful Improvement in Signs, of which the following is a specification.

My invention relates particularly to signs adapted for street purposes and provided with illuminating means; and my primary object is to provide a sign of improved construction and appearance, capable of being manufactured at a moderate cost, and having provision for the ready substitution of new lettering or new lettered-panels.

The invention is illustrated in its preferred embodiment in the accompanying drawings, in which—

Figure 1 represents a perspective view of a sign constructed in accordance with my invention; Fig. 2, a plan view of the same with the upper section of the sign removed; Fig. 3, an enlarged broken longitudinal vertical sectional view showing the outer end-portion of the sign; Fig. 4, a transverse section taken, as indicated, at line 4 of Fig. 3; Figs. 5 and 6, horizontal sectional views taken, as indicated, at the corresponding lines of Fig. 3; Figs. 7 and 8, broken vertical sectional views taken, as indicated, at the corresponding lines of Fig. 2; Fig. 9, a broken longitudinal sectional view through the upper portion of the sign, showing one end-plate of the frame detached; Fig. 10, a broken transverse vertical section taken, as indicated, at line 10 of Fig. 9; Fig. 11, a broken perspective view of the end-plate which is shown detached in Fig. 9; Fig. 12, a transverse sectional view showing a modification; Fig. 13, a broken side elevational view, on a reduced scale, of the construction shown in Fig. 12; and Fig. 14, a broken section taken, as indicated, at line 14 of Fig. 12.

Referring to Figs. 1 to 11, inclusive, the construction, in the form illustrated, comprises a horizontally-disposed frame A which may be connected with the side of a building in any suitable manner; a series of illuminable sign-sections, or panel-equipped devices B depending from the frame A; and a sign-section, or panel-equipped illuminable device C surmounting the frame A.

The frame A preferably is constructed of a pair of angle-bars 1 and 2 extending parallel with each other and separated by a space of a few inches; transverse-bars or

spacing-members 3 connecting said angle-bars; a centrally-disposed tubular member 4 resting on the cross-bars 3; and a series of transverse-bars 5 connected with the angle-bars 1 and 2 and having their central portions curved upwardly, as indicated at 6, to accommodate the tubular member or pipe 4. The angle bars 1 and 2, which are disposed in a horizontal plane, have one set of flanges turned toward each other and the other set of flanges turned upwardly, as will be readily understood from Fig. 7, whereby a space is afforded between the vertical flanges in the central portion of which the pipe 4 is located.

The inner end of the frame A is shown equipped with an angle-bracket 7 which may be connected with a wall of a building; and the outer ends of the bars 1 and 2 are connected by a bolt 8, with which are connected supporting cables 9, represented as three in number. The cables 9 are equipped at their outer ends with connecting members 10 which are pivotally joined to the bolt 8. One of the cables is connected with the central portion of the bolt and the other two with the end-portions thereof, the members 10 being separated or spaced by spacing-sleeves 11.

The pipe 4 serves as a conduit for electric-conductors 12, which may pass from the building through said pipe, said conductors having connected therewith electric-lights 13 located in chambers B and C. The outer end of the pipe 4 is equipped with an elbow 14 having a down-turned open end through which the conductors for the last of the series of lamps 13 pass. Said pipe is also provided at intervals in its lower side with perforations or outlets 15 through which the electric conductors for the lamps may pass.

While the bracket 7 provides for a substantially rigid connection between the inner end of the frame A and the building, it will be understood that any desired connection may be employed at this point.

Each panel-equipped device or chamber B preferably comprises a sheet-metal top-plate 16 of rectangular form and having down-turned flanges 17; angle-form corner-members 18 depending from the corners of the flanged top-plate 16 and inclining as shown; a channel-form lower rim-member 19 connected with the lower ends of the corner-members 18; transparent end-panels 20; and transparent character-bearing side-

panels 21. The flanges 17 form an upper rim-member within which the upper margins of the glass-panels 20, 21 are received, channels 22 being provided for the reception of the upper ends of the glass-panels by attaching angle-form clips or lugs 23 to the top-plate 16, the depending flanges of said members 23 co-acting with the flanges 17. Preferably the upper ends of the corner-frame members 18 fit within the corners formed by the flanges 17, said members 18 being secured by means of solder; and the members 23 may likewise be secured in place by means of solder. The channel-bars 19 which form the lower rim-member preferably have relatively wide upturned outer flanges 24 and relatively narrow upturned inner flanges 25, the flanges 25 being narrower than the length of the depending flanges of the members 23, so that the panel may be inserted by entering its upper end in the channel 22, passing the lower end over the flange 25 of the lower rim-member, and then allowing the panel to drop into the channel 26 of the lower rim-member. Within the corners of the angle-bar corner-members 18 are soldered small reversely-flanged members 27 which afford bearings for the edges of the glass-panels; and to the inner surfaces of the flanges of the angle-bar corner-members 18 are soldered flexible sheet-metal members 28, which may be bent, according to necessity, to secure the vertical margins of the glass-panels. The members 28 may likewise be bent back to permit the glass-panels to be removed, either for the purpose of washing the same or substituting other panels. The panels 21 may serve as individual panels for the reception of letters, so that when the panels are rightly associated a name is produced. The lower ends of the chambers B may be left open. As thus described, each chamber, or panel-equipped device, B presents somewhat the appearance of a truncated hollow pyramid with transparent sides, two of the sides being employed for receiving sign-characters. The top-plates 16 are provided with central-perforations 29 through which depend the electric-conductors with which the electric lamps 13 are connected, each chamber thus serving as an individual housing for an electric-light. Each top-plate 16 is detachably connected with the horizontal flanges of the angle-bars 1 and 2 by means of bolts 30.

The surmounting device C, as will be understood by reference to Figs. 1, 9, 10 and 11, preferably comprises a sheet-metal bottom-plate 31, which is supported on the angle-bars 1 and 2, the metal of which is bent up and then back upon itself to afford upturned flanges 32, the metal being then extended downwardly to form flanges 33 which embrace the vertical flanges of the angle-bars 1 and 2, and are connected therewith by

means of bolts 34; a sheet-metal top-plate 35 having downturned lateral flanges 36; vertically-disposed sheet-metal division-plates 37 connected at their lower ends with the bottom-plate 31 and at their upper ends with the top-plate 35; end-plates 38 and 39, the latter of which is removable; and glass-panels 40 forming the sides of the chamber and removably inserted in guides 41 and 42 with which the bottom plate 31 and top-plate 35 are equipped, respectively, on their inner surfaces. The guides 41 and 42 may be formed by securing small channel-bars adjacent to the flanges 32 and 36, as illustrated. The end-plates 38 and 39 incline, as shown in Fig. 9, and have lateral flanges 43 adapted to embrace the end-portions of the bottom-plate 31 and top-plate 35, said flanges 43 serving also to house the end of the glass-panels 40. As shown in Fig. 1, the lower ends of the plates 38 and 39 are provided with central recesses 44 which accommodate the pipe 4, and with recesses 45 which accommodate the flanges 32 and the vertical flanges of the angle-bars 1 and 2. As has been indicated, the end-plate 39 is removable. It is provided at its upper end with an intumed flange 46 adapted to fit over the top-plate 35, said flange and top-plate being provided with perforations adapted to receive a pin 47. The vertical plates 37, the bottom-plate 31 and the top-plate 35 may be enameled or painted white on the surface presented to the interior of the chamber, in order to reflect the light from the lamps 13. This may be true, also, of the interior surfaces of the end-plates 38, 39. To remove the panels 40 it is necessary only to remove the end-plate 39, when the panels may be moved longitudinally in their guides.

A sign of the construction described is strong, durable and of pleasing design and appearance. The individual panels are removable for the purpose of renewal or substitution, and, in case of breakage, the expense of repair is reduced to a minimum. Ordinarily, art-glass is employed in the transparent panels, hence the economy resulting from the possibility of renewing the panels or letters individually is of great importance. The surmounting device C may or may not be employed. When it is employed it may serve to receive the name of a merchant, the individual panels serving to indicate the character of the business conducted. The construction provides for securely housing the electric conductors and hiding the conduit which contains them from view when the sign is viewed from the street, and the open-work construction of the frame A prevents objectionable accumulation of dirt and permits the sunlight to pass between the devices B and through the end-panels 20 thereof, thereby insuring

good illumination of the letters in the daytime.

In the modification illustrated in Figs. 12, 13 and 14, the general construction is the same as the construction already described, and the parts are similarly lettered. In this construction, however, the spaces 48 between the adjacent devices B are flanked by glass-plates or panels 49 held by channel-form guides 50 and 51 carried by the upper and lower rim-members 17 and 19 of the frames of adjacent devices B. The panels 49 are secured in the channels 50 and 51 by lugs 52, as shown in Fig. 14. As will be understood from Figs. 13 and 14, the edges of the panels 49 overlap or project past the corners of the adjacent devices B slightly; and the panels 49, as will be understood from Fig. 12, are carried at a short distance from the glass-panels 21 of the devices B, being separated by a space 53, so that light thrown upon the inner surfaces of the panels 49 may be reflected upon the outer surface of the panels 21. In this construction, electric-lights 54 may be located between adjacent devices B, so as to throw light upon the inner surface of the panels 49 from whence it will be reflected upon the outer surfaces of the panels 21. Where the modified construction is employed, the lamps within the devices B may be dispensed with, if desired, and so also may be the end-panels 20 of the devices B.

The foregoing detailed description has been given for clearness of understanding only, and no undue limitation is to be understood therefrom.

What I regard as new, and desire to secure by Letters Patent, is—

1. In a sign, the combination of a supporting-frame, a series of panel-frames depending therefrom, each comprising a top-plate provided with panel-receiving channels, corner-members depending from said top-plate, and a lower rim supported by said corner-members and having a channel bounded by a relatively narrow inner flange, and removable character-bearing panels received in said channels.

2. In a sign, the combination of a pair of

angle-bars having one set of flanges turned toward each other and another set of up-turned flanges, cross-members connecting said angle-bars, a pipe supported on said cross-members, panel-supporting frames depending from said angle-bars, character-bearing panels carried by said panel-supporting frames, electric lights serving to illuminate said panels, and electric conductors connected with said electric lights and extending through said pipe.

3. In a sign, the combination of a horizontally-disposed frame, a series of horizontally alined panel-frames depending therefrom, character-bearing panels carried by said panel-frames, and a surmounting device carried by said frame and comprising a frame and character-bearing panels removably connected therewith.

4. In a sign, the combination of a horizontally-disposed open frame, a pipe supported thereon and provided in its lower side with openings, electric conductors in said pipe extending through said openings, a series of horizontally alined panel-frames depending from said first-named frame, character-bearing transparent panels supported by said panel-frames, electric lights within said frames, a device surmounting said first-named frame comprising a frame composed of a top-plate and end-plates, removable character-bearing transparent panels carried by said last-named frame, and an electric light within said last-named frame, said conductors being connected with said electric lights.

5. In a sign, the combination of a pair of angle-bars having a set of flanges turned toward each other and another set of up-turned flanges, cross-bars connecting said angle-bars, a cross-bolt connecting the outer ends of said angle-bars, cables connected with the central and end portions of said bolt, spacing-sleeves on said bolt, and a series of panel-equipped individual frames depending from said angle-bars.

CLARK C. WORTLEY.

In the presence of—

A. U. THORIE,
R. A. SCHAEFER.

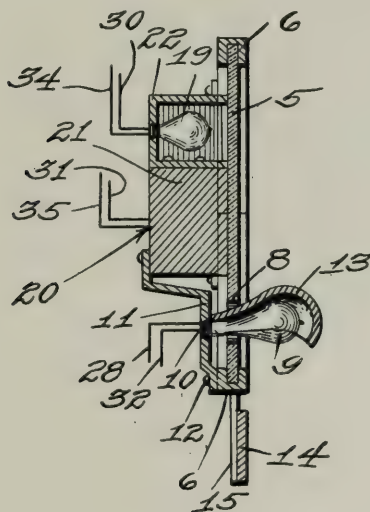
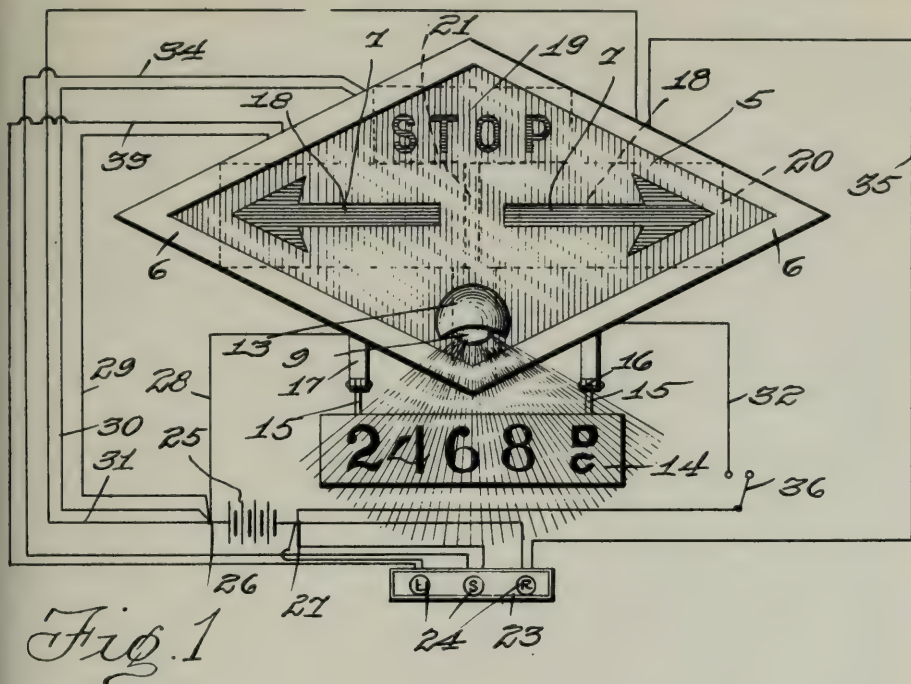
Defendants' Exhibit "N."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "N." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

1,238,763.

Patented Sept. 4, 1917.



Witnesses

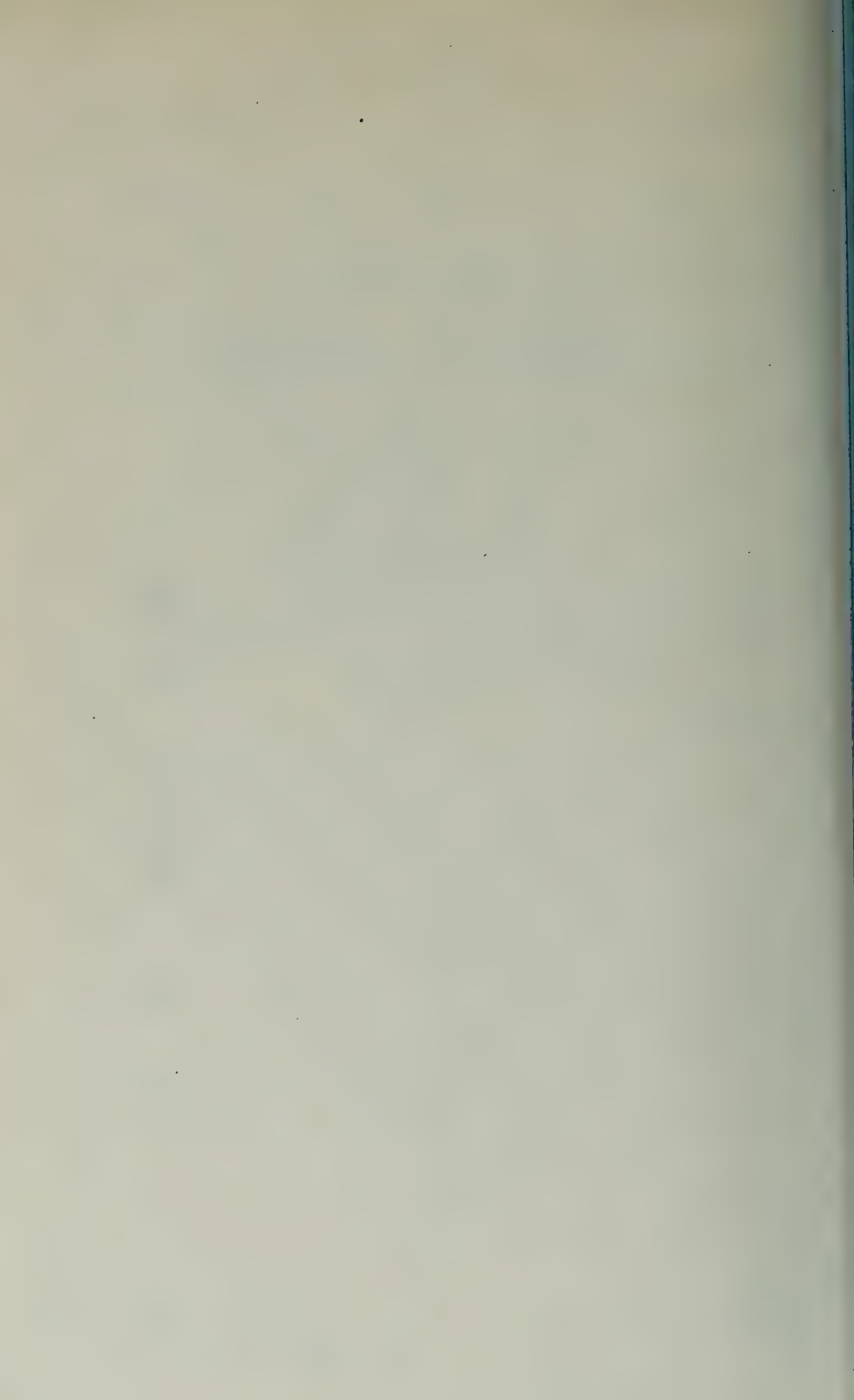
W. H. S. S. S. S.
C. W. S. S. S.

By

Alfred M. Harris,
Richard S. S.

Inventor

Attorney



ALFRED M. HARRIS, OF DETROIT, MICHIGAN, ASSIGNOR OF THREE-EIGHTHS TO JOSEPH J. SULLIVAN, OF DETROIT, MICHIGAN.

DIRECTION-INDICATOR

1,238,763.

Specification of Letters Patent.

Patented Sept. 4, 1917.

Application filed January 14, 1916. Serial No. 72,155.

To all whom it may concern:

Be it known that I, ALFRED M. HARRIS, a citizen of the United States, residing at Detroit, in the county of Wayne and State of Michigan, have invented certain new and useful Improvements in Direction-Indicators, of which the following is a specification.

This invention relates to direction signals for automobiles or other vehicles, and as a particular object aims to provide a device of this character whereby the driver will be enabled to readily signal pedestrians or following cars an intended change of direction in the course of his vehicle.

A further object is to provide a direction signal which shall be readily applicable to either the forward or rear portions of an automobile or other vehicle in order to indicate simultaneously at each portion a change in the direction of the vehicle's travel to persons both approaching and following the car, whether on foot or driving other vehicles.

A still further object is to provide a signal of the simplest sort which will be usable either at night or in the daytime and which may be electrically controlled by the driver in such manner as not to interfere in any way with his operation of the ordinary driving mechanism, and at the same time to furnish an indicator of this type, which may be cheaply manufactured and also durable and efficient in operation.

The above and additional objects which will become apparent as this explanatory description proceeds, are accomplished by such means as are illustrated in the accompanying drawings, described in the following specification, and then more particularly pointed out in the claims which are appended hereto and form a part of this application.

With reference to the drawings, wherein there is illustrated the preferred embodiment of this invention, as it is reduced to practice, and throughout the several views of which like characters of reference designate similar parts:—

Figure 1 is an elevational view of the direction indicator comprehended by this invention with its wiring diagram, and

Fig. 2 is a vertical sectional view through the device.

In attaining the objects of this invention, there is made use of an indicating plate designated as a whole by the numeral 5 and preferably constructed from glass or some other transparent material, the exposed edges of which may be protected by suitable binding 6, metallic or otherwise. A most convenient shape for this indicating plate is illustrated in the drawings in the diamond form which accommodates itself readily to certain necessary qualifications for a plate of this character. The background of the plate is preferably of a dark color in order to contrast with the oppositely directed laterally extending arrows 7 which are also transparent and preferably formed integrally with the main body of the indicating plate 5, although differently colored, such as white or a light red in order to attract attention by contrast with the dark background when illuminated from behind as directed by this invention.

The arrows 7 are normally not distinctive enough to particularly attract attention until so illuminated and are adapted to be separately illumined in indicating a proposed turn of the vehicle to either the right or the left. The body 5 is formed with an aperture 8 adjacent the lower central corners of the diamond-shaped plate 5 in order to receive the incandescent lamp 9 which may be inserted through this aperture and removably secured as at 10 in a bracket 11 secured to the binding 6 by means 12 at this lowermost point. A reflector 13 is also secured to the bracket 11 and arranged over and partially around the lamp 9 in such manner as to direct the light from this latter upon a license plate 14 as particularly illustrated in Fig. 1, such plate being supported by hangers 15 forming hinged connections with the bifurcated extremity of supports 17.

The illumination for the arrows 7 and for the "Stop" indication is assured by the incandescent lamps 18 and 19 respectively, the former being secured in a suitable box-like casing 20 in horizontal alignment separated by the partition 21 and each directly behind its respective arrow 7. The "Stop" indication is assured by forming the letters of this word in the back ground of the plate 5 in any manner similar to the arrows, and the lamp 19 to illuminate these

letters is mounted within a casing 22 superimposed above the first casing 20 and like this latter presenting an open face to the rear of the plate 5.

5 Since suitable manual control means are to be provided for separately illuminating the lamps 18 and 19, a switch plate 23 is preferably positioned at some point adjacent the hand of the driver of the car and may indeed be inset into the rim of the steering wheel if desired. This plate carries a trio of buttons 24 adapted to make separable contacts and lettered respectively L, S and R and indicate the left arrow, the stop the right arrow. These button switches are adapted to be connected with their lamps in multiple with a suitable source of difference of potential 25 provided with terminals 26 and 27.

20 From the former terminal, wires 28, 29, 30 and 31 lead respectively to the license plate lamp 9, the left arrow lamp 18, the stop indicator, and the right arrow 18. From each of these lamps, return wires 32, 33, 34 and 35 respectively lead to the opposite battery terminal 27 and the last three of these include in their circuit the previously mentioned button switches normally maintained out of contact until depressed to allow the momentary lighting of the particular lamp to assure a signal of the intended direction of the vehicle to be given. The return wire 32, however, includes in circuit the single throw switch 36 whereby the license plate lamp may be turned out whenever desired without interfering with the operation of the other separate circuits.

40 From the foregoing it should be obvious, without necessitating any further discussion of the operation thereof, that means have

been disclosed whereby the previously presented objects are capable of being accomplished so that this invention may, accordingly, be claimed as possessing the advantages and desirability set forth in such objects. 45

What is claimed is:

1. A signal comprising a transparent plate having indicia thereon and also provided with an opening, illuminating means 50 for the transparent plate, a second plate mounted below the transparent plate and also having indicia thereon, and a reflector positioned in the opening in the transparent plate to project light rays upon the second 55 mentioned plate.

2. A signal comprising a transparent plate having indicia thereon and further provided with an opening, a casing positioned behind the transparent plate and 60 carrying illuminating means, a second plate mounted below the transparent plate and also having indicia thereon, and a reflector extending through the opening to project light rays upon the second mentioned plate. 65

3. A signal comprising a transparent plate having indicia thereon and further provided with an opening, a casing positioned behind the transparent plate and carrying illuminating means, means connected with the 70 bracket and projecting through the opening, a reflector also carried by the bracket, and a license plate disposed below the reflector.

In testimony whereof I affix my signature 75 in presence of two witnesses.

ALFRED M. HARRIS.

Witnesses:

W. E. FITCH,

JOHN J. BLAVET.

1,081,800.

Patented Dec. 16, 1913.

2 SHEETS—SHEET 1.

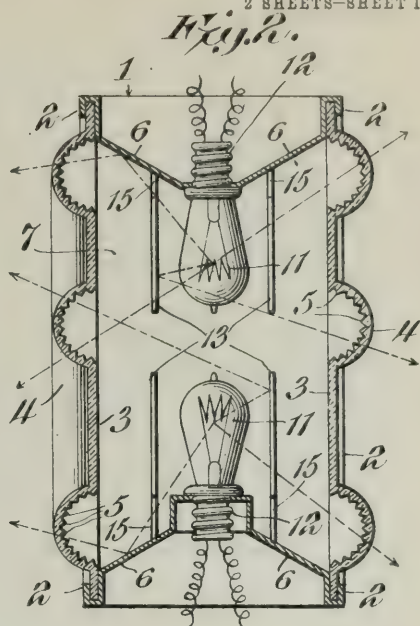
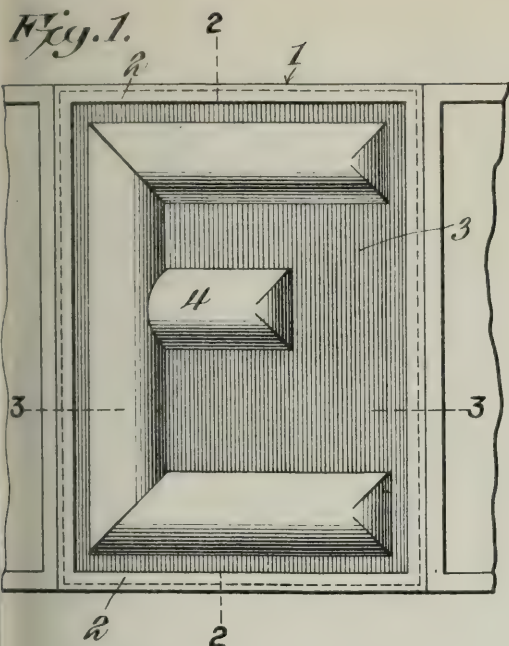


Fig. 3.

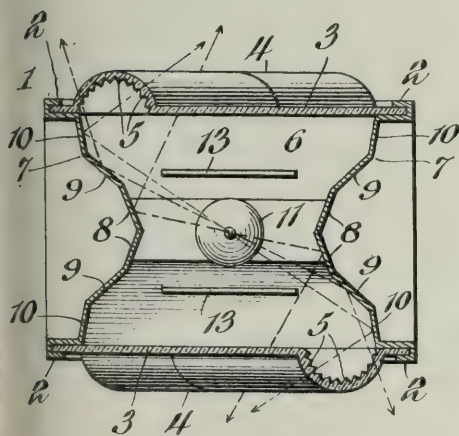
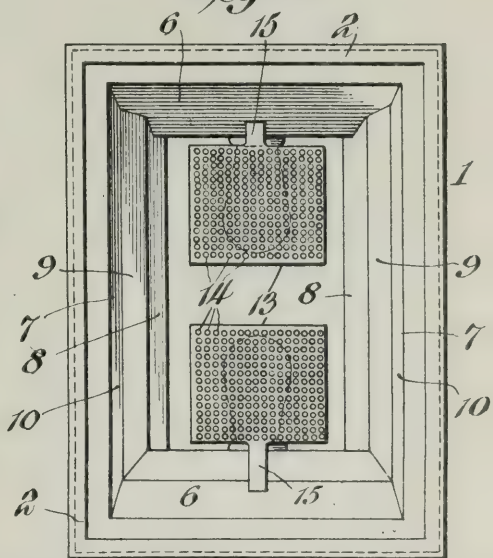


Fig. 4.



Witnesses

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By

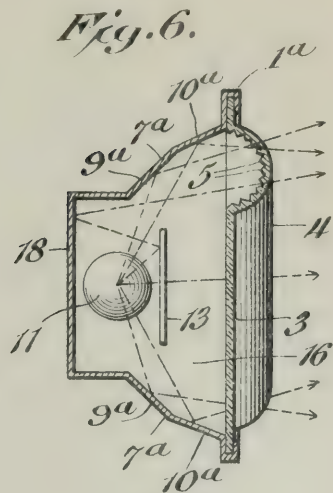
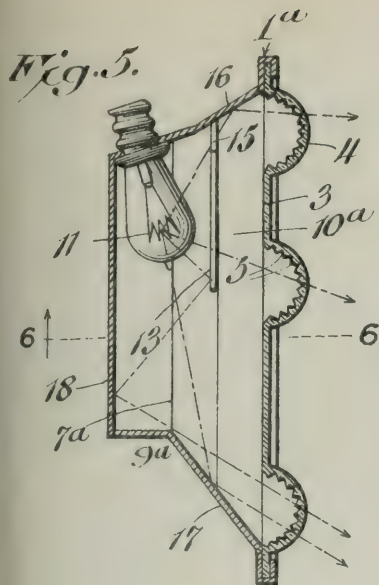
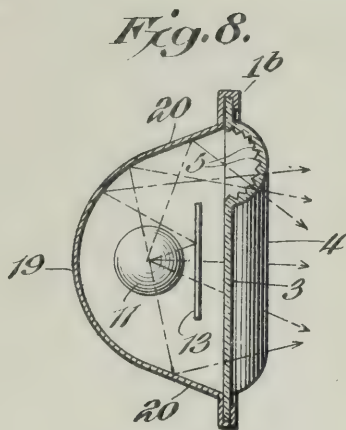
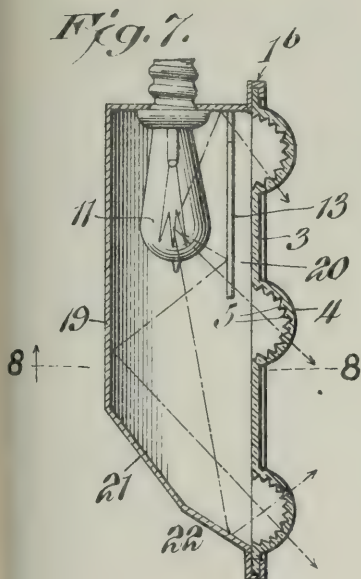
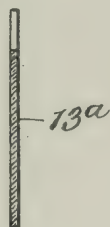
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Patented Dec. 16, 1911

2 SHEETS—SHEET 2.

*Fig. 9.*

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UNITED STATES PATENT OFFICE.

ROY B. WILEY AND WALLACE K. WILEY, OF BUFFALO, NEW YORK, AND WILLIAM S. HOUGH, JR., OF ST. CATHERINES, ONTARIO, CANADA.

ILLUMINATED SIGN.

1,081,800.

Specification of Letters Patent.

Patented Dec. 16, 1913.

Application filed June 21, 1911. Serial No. 634,302.

To all whom it may concern:

Be it known that we, ROY B. WILEY and WALLACE K. WILEY, citizens of the United States, residing at Buffalo, county of Erie, State of New York, and WILLIAM S. HOUGH, JR., a citizen of the United States, residing at St. Catharines, Province of Ontario, Canada, have invented a new and useful Illuminated Sign, of which the following is a specification.

This invention has reference to improvements in illuminated signs, and its object is to provide an illuminated sign which shall be clearly visible both in daylight and at night, and in the latter case when illuminating means is utilized, the source of light will so affect the parts to be lighted as to produce a sensibly even illumination of all parts of each letter or character of the sign without blurring, all portions of each character receiving a due proportion of light.

In accordance with the present invention the characters are formed of transparent or translucent material, such as glass, with the inner walls, that is the walls remote from the observer, or, if desired, the outer walls, prismatic, so that the light rays are broken up, and blurring, which is liable to occur when intense light is directed through the front of the latter, is avoided. The prismatic effect may be produced by ridges or otherwise, and greatly enhances the brilliancy of the letters as viewed by daylight.

The light source or sources are commonly in the form of electric lights of any suitable character, and the light rays emanating from the source or sources of light are modified by a screen interposed between the character to be illuminated and the source of light, this screen being usually in the form of a perforated plate, although it may be otherwise constructed so long as it is capable of transmitting some of the light coming from the source of light and reflecting a portion of the light. In conjunction with the screens there are provided reflecting surfaces so related to the letters, that the light rays will find their way through the inner walls of the letters in lines varying from a close approach to perpendicularity with relation to the front of the characters to angles which will cause the light rays to pass through the light transmitting portions of the characters at the sides thereof in lines at considerable angles to the first named

rays. By the present invention the light rays are so distributed that the letters or characters, the surfaces of which are raised, receive the light in such an evenly distributed manner that whether the observer views the letters directly in front or above or below, or to one side, the illumination appears to be equally brilliant.

The invention will be best understood from a consideration of the following detailed description, taken in connection with the accompanying drawings forming a part of this specification, with the understanding, however, that while the drawings illustrate several practical embodiments of the invention, the latter is susceptible of other practical embodiments, and, therefore, is not limited to the exact showing of the drawings, but may be variously modified within the scope of the invention as expressed in the claims.

Referring to the drawings: Figure 1 is a front elevation of a portion of a sign showing particularly one character thereof. Fig. 2 is a section on the line 2—2 of Fig. 1. Fig. 3 is a section on the line 3—3 of Fig. 1. Fig. 4 is a face view of one element of the sign with the character portion removed. Fig. 5 is a view similar to Fig. 2, but showing an arrangement wherein the sign is provided with but a single light transmitting face. Fig. 6 is a section on the line 6—6 of Fig. 5. Fig. 7 is a section similar to Fig. 5, but showing still another form of the invention. Fig. 8 is a section on the line 8—8 of Fig. 7. Fig. 9 is a sectional view of a modified form of screen or light toning down means.

A sign constructed in accordance with the present invention may be either double face or single face and both forms are illustrated in the drawings. The sign may be made up of units each of which embraces a single character if of the single face type, or two like or different characters if of the double face type, and one or more light giving units may be housed in each sign unit, the usual mode of illumination being in the form of an electric lamp of appropriate type.

In the drawings there is shown a sign unit in the form of an appropriate frame or casing in size and general shape being the same for all the several characters of the sign. The frame of the unit may be made of metal or other suitable material with a bor-

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der flange 2 adapted to embrace the edges of a plate 3 upon which is produced a sign character 4, shown in the particular illustration of the drawing as comprising the letter "E," but, of course, it will be understood that this is simply indicative of any sign character of any kind.

The plate 3 is usually though not necessarily made of some transparent or translucent material capable of transmitting light either freely or partially, and the material best adapted for the purpose is glass. The character is produced upon the glass plate 3 in raised relation thereto, the portions of the character being in cross section preferably semi-circular or approximately so, although this does not preclude the formation of the character in a different shape. By so forming the character, and at the same time producing on the inner walls of the character ribs 5 or other shapes, the inner wall of the character is made more or less prismatic. The plane portion of the plate may be made opaque to light, so that light rays emanating from a source of light on one side of the plate will find passage there-through only where the light transmitting portions agreeable to the shape of the character are present. That side of the plate toward the light source presents a reflecting surface.

In the particular double structure shown in the drawings there are reflectors 6 at the top and bottom of each element 1 slanting from the respective top and bottom margins of the sign character toward an intermediate plane about midway between the two sign characters, so that these reflectors, which are straight reflectors extending from side to side of respective sign characters, are each at an acute angle to the plane of the inner face of the sign character. At each side of the element 1 there are reflecting walls or reflectors 7 each composed of sections 8, 9 and 10 each at an obtuse angle one to the other and at an acute angle to the plane of the rear face of the respective sign character, the reflectors 7 having a general slant inwardly toward the center of the element from the sides of the respective sign character. The section 10 of each reflector 7, which section is next to the inner wall of the sign character, is related to the general plane of the rear wall or face of the sign character, so as to be at an angle thereto of a little less than ninety degrees. The section 9 is at an obtuse angle to the section 10 but at a less angle to the plane of the rear face of the sign character. The section 8, which is the most distant of the sections of the reflector 7 from the sign character, is at an obtuse angle thereto intermediate of the angles of the sections 9 and 10.

In the particular structure shown in Figs. 1 to 4 there are two light sources 11, indi-

cated as the filament of an incandescent electric lamp, but this is to be considered as simply indicative, for any other type of lamp adapted to the purpose may be used. These lamps in the particular showing of the drawings have their tip ends directed one toward the other and their base ends at the top and bottom of the casing, respectively, it being understood, of course, that suitable supports in the form of appropriate sockets 12 are provided. If light produced from the lamps be allowed to reach the light transmitting walls of the character 4 in direct lines from the light sources, some portions of the character will be strongly illuminated and other portions will receive much weaker light rays, with the result that the character will appear to be unevenly illuminated. To cause a distribution of the light whereby the light rays will reach with substantially equal intensity all parts of the light transmitting portion of the sign character, there is introduced between the inner wall of the plate 3 and the lamp 11 a screen 13 in the form of a flat or other shaped plate, such screen in the particular showing of Fig. 4 being provided with numerous perforations 14. The screen 13 is of a height and breadth sufficient to interpose or come between the eye of the observer and the light source at substantially all angles of direct vision through the strokes of the sign character. The inner walls of the members 6 and 7 and those walls of the screens 13 toward the lamps 11 are reflecting surfaces, while the screens are supported by narrow stems 15 outstanding from the respective walls 6.

The light rays emanating from the light giving elements of the lamps will in part pass through the perforations 14 and in part will be reflected by the adjacent surface of one or the other of the screens 13. Those light rays which pass through or by the screens will either reach a light transmitting portion of a character or will strike one of the reflecting walls of the element 1, and those light rays which do not pass through or strike the screen will directly reach the reflecting walls of the sign element 1, and by these walls will be diverted to the light transmitting portions of the character at different angles, ranging from lines almost perpendicular to the front surface of the character to lines varying sufficiently from the first named lines to traverse the sides of the raised portion of the character, so as to reach the eye of the observer, whether above or below the character, or to either side thereof, apparently as coming directly from the light source. The diversity of angles at which the light is directed is caused by the different and many angular positions of the reflector surfaces, all of which are straight and flat and inclined to the general

plane of the rear of the sign character, so that light is multi-directionally reflected to the inner walls of the hollow strokes of the relief character and is further dispersed by the prismatic inner walls of the hollow relief strokes of the sign character. There is, however, loss of light due to reflection and varying distances of portions of the sign character from the source of light, but by properly proportioning the parts the differences in illumination of the various portions of the character are so slight that these differences are not sensible to the observer, wherefore the illumination by reflection may be said to be equal throughout the light transmitting portion of the character. The screens 13 by cutting off a large portion of the direct rays from the character further equalize the light and prevent that intensity of illumination of the character which would otherwise be apparent when the character is viewed from in front, and this modification and toning down of the direct light rays contributes to the even distribution of light resulting in the even illumination of the character, while the prismatic effect due to the ribbed or other shaped inner walls of the light transmitting portion of the character contributes to the prevention of blur.

The angular form of the reflecting walls of the casing or receptacle for the light giving element, which walls are presented toward the character carrying face of the receptacle, causes the distribution of the light in the manner stated, without the necessity of making the light receptacle of so great a depth as is necessary where parabolic reflectors are used, while the spread of the light whereby the sides, as well as the front of the characters, are illuminated, is found to be better accomplished than with a parabolic reflector.

So far the sign element described has been of the double face type. With a single face sign there is provided a casing or sign element 1^a as shown in Figs. 5 and 6, or 1^b as shown in Figs. 7 and 8. The plate 3 and the transparent portions defining the character 4 are the same as in the other forms, and the light element 11 and the screen 13 are the same as in the other form already described. In this structure the light element 11 may be arranged say at the top of the casing of the sign element and the top wall may be inclined as shown at 16, while the lower wall may be oppositely inclined as shown at 17 and the back of the casing may be in the form of a reflecting wall 18 substantially parallel with the plate 3. The inner faces of the walls 16, 17 and 18 are made reflecting, and the parts are so disposed that in conjunction with the screen 13 light rays are directed through the light transmitting portions of the character in various directions to approximately evenly distribute the

light throughout these light transmitting portions, wherefore the character appears to be brilliantly illuminated from whatever angle it be viewed. In the structure shown in Figs. 5 and 6 the upright walls of the casing are indicated at 7^a and have angle portions 9^a and 10^a corresponding to the like portions 9 and 10 of the structure shown in Figs. 1 to 4, and serve a like purpose, while the reflecting portion of the screen 13 and the reflecting portion of the backing 18 of the casing contribute toward the even illumination of the entire visible surface of the character.

In the structure shown in Figs. 7 and 8 the plate 3 and character 4, as well as the light element 11 and screen 13, are substantially the same as the like parts in the structures shown in the other figures. In the structures shown in Figs. 7 and 8, the light giving element 11 is at the top of the sign element, although, of course, it will be understood that by a reversal of the parts in this form of the invention, as well as in the other form shown in Figs. 5 and 6, the light giving element might be located at the bottom of the sign element. In the structure shown in Figs. 7 and 8 the casing indicated at 19 is approximately parabolic in cross section, such section being taken transversely of the longitudinal axis of the lamp 11, and also transversely to the length of the sign character, although the walls of the casing where approaching the plate 3 may be approximately flat as indicated at 20, while disposed at an angle to the plane of the plate 3. The end of the casing 19 remote from the lamp 11 is formed with inner walls 21, 22 at an angle to each other, and to both the main portion of the casing 19, and the plate 3, so that a number of reflecting surfaces are provided directing the light at various angles through the corresponding portion of the sign character.

In the forms shown in Figs. 5 and 7 the light element is near one end of the sign character, but instead of brilliantly illuminating this end of the sign character the intensity of illumination is modified by the screen 13, so as to substantially equalize the illumination of the character adjacent the light element with the illumination of the other end of the sign character where it is comparatively distant from the light element, and the light rays are directed at various angles through the corresponding portions of the sign character, whereby the character is well illuminated from whatever angle it may be viewed, the prismatic form of the inner walls of the light element preventing objectionable blurring liable to occur where such light distributing means are omitted, for by refracting and breaking up the general direction of the intense light from the reflectors, the letters appear uni-

formly and brightly lighted even from an angle. Not only is the effect from the front greatly improved, but, since most of the light rays are diverted from a path perpendicular to face of the letter where they issue therefrom, a minimum of rays are observed from a distance and the letter is not blurred.

The screen may be of perforated metal, as in Fig. 4 or may be of glass, as shown at 13^a in Fig. 9, different types of glass having been successfully used, but whatever be its character the purpose of the screen is to modify by reduction the amount of light transmitted by the light element to the immediately adjacent portions of the sign character, whereby the illumination of such portions is approximately the same as the illumination of portions more distant with relation to the light giving element.

Generally speaking, the light where reflected is reflected at such angles that the rays will in part pass through the sign character at an angle but little removed from the perpendicular with relation to the plane of the sign character, while other rays pass through the sign character, at a considerably greater angle, so as to illuminate the sides of the raised character and the light is distributed approximately uniformly by means of the screens introduced between the sources of light and the sign characters. It is found in practice that it is not advisable to direct the light rays actually perpendicular to the plane of the sign character, for the letters are liable to then unduly blur as seen by the observer. Furthermore, the provision of ridges or other prismatic forms on the inner walls of the sign characters contributes to the brilliancy of illumination, and the brilliancy of the letters or other characters when viewed by daylight.

What is claimed is:—

1. In an illuminated sign, a sign character of light transmitting material having the strokes of the character in relief and each with one face prismatic throughout and otherwise of constant thickness, light giving means back of the visible face of the sign character, reflecting means in partial surrounding relation to the light giving means and constructed to direct light from the light giving means through the strokes of the sign character, and light transmitting and toning down means between the light giving means and the sign character and related to the reflector to permit reflected light to pass to the strokes of the sign character substantially without interference by any part of said light transmitting and toning down means, and said last-named means where presented toward the light giving means being reflecting to direct the light striking thereagainst to the first-named re-

flector to be again reflected thereby to and through the strokes of the sign character, said light transmitting and toning down means being constructed to transmit a portion of the light reaching it unmodified and directly to and through the strokes of the sign character.

2. In an illuminated sign, a sign character of light transmitting material having its strokes in relief with one face prismatic throughout, light giving means back of the sign character, a plurality of angularly related and substantially flat reflectors surrounding the light giving means and shaped to direct light therefrom to and through the strokes of the sign character, and perforated light-screening means between the light giving means and the sign character and of a length and breadth to cover the light giving means from substantially all angles of direct vision through the strokes of the sign character.

3. In an illuminated sign, a sign character of light transmitting material having the strokes in relief with the rear faces of the strokes prismatic, light giving means on the side of the sign character remote from that to be observed, reflectors for directing light from the light giving means to and through the strokes of the sign character, and perforated light screening means between the light giving means and the sign character and located substantially in non-interfering relation to light coming from the reflectors, said perforated light screening means being provided with supporting means attenuated where in the path of light rays directed to a stroke of the sign character, and said light screening means where presented toward the light giving means being reflecting.

4. In an illuminated sign, a sign character of transparent material with the strokes in relief and each with one face prismatic throughout, light reflecting means back of the sign character, light giving means also back of the sign character and related to the reflectors to cause light reaching the latter from the light giving means to be directed through the strokes of the sign character, said light giving means being located within the limits defined by the upper and lower margins of the sign character, and light reducing means pervious to direct rays of light from the light giving means to and through the strokes of the sign character without modification of such direct rays and intermediate of the light giving means and the strokes of the sign character in spaced relation to both and having a spread to interpose between the observer and the source of light from substantially all points of direct vision through said strokes of the sign character toward the light giving means and limited in the extent of spread to be in substantially non-interfering relation to light

reaching the character strokes from the reflecting means.

5 5. In a sign, a sign character of transparent material having the strokes in relief and prismatic throughout on the rear faces, light giving means back of the sign character and located within the limits defined by the upper and lower margins of the sign character, reflecting means in partial surrounding relation to the sign character, and light transmitting and toning down means between the light giving means and the strokes of the sign character and interior to and spaced from the reflecting means, said
10 light transmitting and toning down means being of a height and breadth with respect to the light giving means, the reflecting means and the strokes of the sign character to interpose in the direct line of vision toward the light giving means through the strokes of the sign character at substantially any angle thereto and to be in substantially non-interfering relation to the reflecting
15 means.

25 6. In a sign, a sign character having hollow strokes of transparent material in convex relief with the inner faces of the strokes prismatic throughout, light giving means at the rear of the sign character, reflectors in partial surrounding relation to the light giving means, said reflectors having substantially flat multi-directional reflecting surfaces to reflect light from the light giving means through the strokes of the character at various angles, and perforated light screening means of opaque material between the light giving means and the sign character and having a breadth and height to interpose between the light giving means and
30 the eye of an observer from substantially any angle of direct vision through the strokes of the sign character and having the margins in spaced relation to the reflecting surfaces to be in substantially non-interfering relation with reflected light directed toward the strokes of the sign character from the light giving means.

7. In a sign, a sign character having strokes of light transmitting material in relief and hollow with the rear faces of the strokes prismatic throughout, straight reflectors about the margins of the rear face of the character in acute angular relation thereto, light giving means back of the sign character located to be partially surrounded by the reflectors, and light screening means constructed to tone down the light and located between the light giving means and the rear face of the sign character with marginal portions in spaced relation to the reflectors and having a length and breadth to interpose between the eye of an observer in front of the sign character and the light giving means at substantially all angles of

direct vision through the strokes of the sign character.

8. A sign having sign characters with hollow strokes of light transmitting material in relief and prismatic over the entire inner surfaces of the strokes and arranged on opposite faces of the sign, reflectors adjacent to the inner wall of each sign character and arranged about the margins thereof at acute angles to the general plane of the inner wall of the sign character, light giving means interior to the space defined by the reflectors and in position to direct light by way of the reflectors through the sign characters on opposite faces of the sign, and light screening means constructed to tone down the light and located between each sign character and the light giving means and of a length and breadth to interpose between the eye of an observer in front of the sign character and the light giving means from substantially all angles of direct vision through the strokes of the sign character.

9. A sign having sign characters on opposite faces, each with strokes in relief, and prismatic throughout the rear faces of the strokes, illuminating means intermediate of the faces of the sign containing the sign characters and in position for direct illumination of the strokes of the sign character, reflectors in partial embracing relation to each source of light and in multi-angular relation to the sign characters to reflect light from the source of illumination at various angles through the strokes of the sign character, and light toning down means for each sign character interposed between the illuminating means and the strokes of the sign character and of a length and breadth to come between the eye of an observer of the sign and the illuminating means from substantially all angles of direct vision through the strokes of the sign character.

10. In a sign, a sign character having its strokes of light transmitting material in hollow relief and prismatic throughout the rear faces of the strokes, illuminating means back of the sign character in position to directly illuminate the strokes of the sign character, reflecting means for the indirect illumination of the sign character from the illuminating means, and light toning down means in the path of direct illumination of the sign character from substantially all angles of direct observation of the illuminating means through the strokes of the sign character, said toning down means being related to the reflecting means to substantially equalize the light reaching the strokes of the sign character both directly and indirectly.

11. In a sign, a sign character having relief strokes of light transmitting material with the inner surface thereof dispersive of

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light, light giving means at the rear of the sign character in position to directly illuminate the strokes of the sign character, reflecting means positioned with respect to the light giving means and the strokes of the sign character to illuminate the sign character by reflected light and shaped to direct the reflected light at various angles through the strokes of the sign character, and light transmitting and toning down means in the path of direct illumination of the strokes of the sign character, the said light transmitting and toning down means being re-

lated to the sign character and the light giving means to substantially equalize the illumination of the sign character by the light giving means. 15

In testimony, that we claim the foregoing as our own, we have hereto affixed our signatures in the presence of two witnesses.

ROY R. WILEY.

WALLACE K. WILEY.

WILLIAM S. HOUGH, Jr.

Witnesses:

EUGENE CARY,

GLENN A. STOCKWELL.

Defendants' Exhibit "O."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "O." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

Defendants' Exhibit "P."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "P," Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monekton, Clerk.

No. 1,191.
32,195

Sign
Patented Apr. 30, 1861.

Fig. 2.

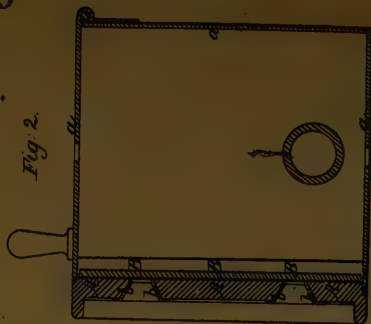
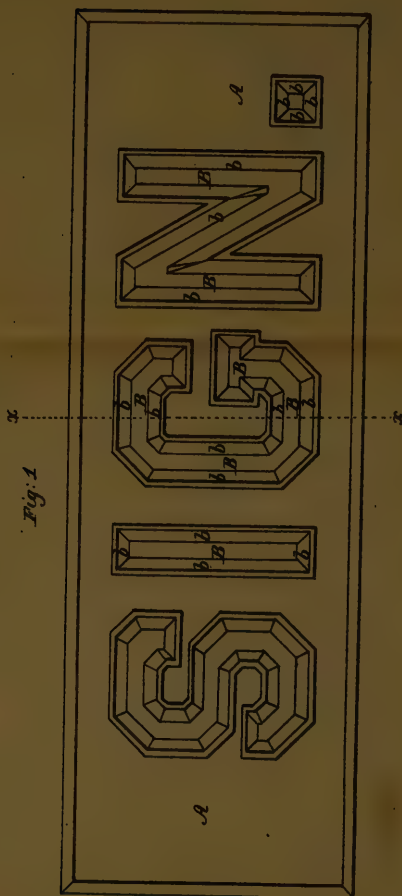


Fig. 1.



Witnesses
C. W. Carson
C. W. Carson

Inventor,
Wm. B. Little.

UNITED STATES PATENT OFFICE.

WILLIAM B. LITTLE, OF NEW YORK, N. Y.

SIGN.

Specification of Letters Patent No. 32,195, dated April 30, 1861.

To all whom it may concern:

Be it known that I, WILLIAM B. LITTLE, of New York, in the county and State of New York, have invented a new and Improved Sign; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, making a part of this specification, in which—

Figure 1, is a front view of my improved sign. Fig. 2, is a transverse section taken in the vertical plane indicated by the red line *a, a* in Fig. 1.

Similar letters of reference indicate corresponding parts in both figures.

My invention and improvement in signs refers more especially to those which are used for out-door purposes, the object being to produce a sign which will be both useful and ornamental as a day, and a night sign, and by the aid of a light placed behind it at night the lettering will be visible and intelligible for some distance.

To enable those skilled in the art to make and use my invention I will proceed to describe its construction and operation.

My improved sign may be constructed wholly or partially of metal.

In the drawings, A represents the sign board, behind and secured to which is a box *a, a, a*, which should be made of thin sheet metal with one of the sides hinged so that access can be had to the interior of the box. The top and bottom of this box should be perforated so as to allow a draft of air to circulate through the box. The sign board A is made of any suitable wood and the letters forming the sign are marked out on this board and then cut through the board, the edges *b, b*, of the letters flaring or beveling outward as represented in the drawings.

When the letters are each cut through the board A, as described, a plate of semi-transparent glass B, or other suitable substance which is semi-transparent is placed at the back of board, A, behind the letters as seen in Fig. 2, and suitably secured in its place.

After the outside surface of the sign is painted, the flaring edges of the letters,

forming the sign, are gilded, bronzed, silvered or covered with any suitable surface which is found most suitable for reflecting light falling upon it from the outside or inside of the sign board.

Instead of forming the flaring letters by beveling the edges of the sign board, the letters may each be made of metal, cast with these beveled edges and with flanges projecting from their flaring edges. The letters may now be cut roughly out on the sign board A and these cast letters introduced and secured by screws or otherwise to board A. The flaring edges of the cast metal letters should be polished or finished up as described for the edges of the letters which are simply cut into the sign board.

A sign may thus be constructed which will present a neat and ornamental appearance as a day sign, and by placing a light behind the letters at night, as represented in Fig. 2, the entire surface of the letters will be illuminated in consequence of the light shining through the glass B, forming the back of the letters, on the beveled metallic surfaces forming the edges *b, b* of the letters.

The back part of the sign board A, being closed in by the box *a, a, a* the light will be confined within this box and only shine through the semi-transparent backs of the letters.

The perforated gas tube C, represented in Fig. 2 which extends longitudinally through the box will be found more suitable for my sign than single tube light.

I am aware that transparent or illuminating block letters, projecting from the sign have been used and these I disclaim.

Having thus described my invention what I claim as new and desire to secure by Letters Patent is—

The construction of illuminated signs in the particular manner herein represented and described.

WM. B. LITTLE.

Witnesses:

C. W. COWTAN,
M. M. LIVINGSTON.

Defendants' Exhibit "Q."

[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "Q." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

NO MODEL.

Fig 1.

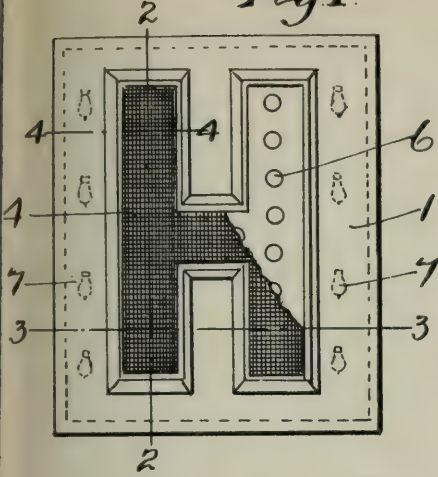


Fig 2.

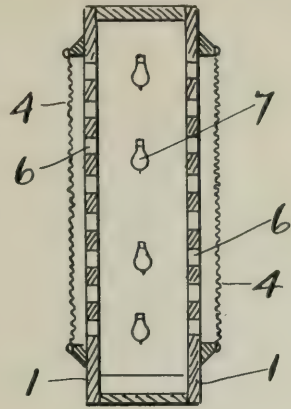


Fig 3.

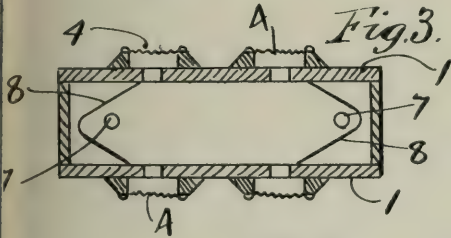


Fig 6.

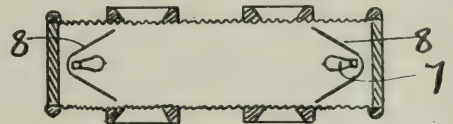


Fig 4.

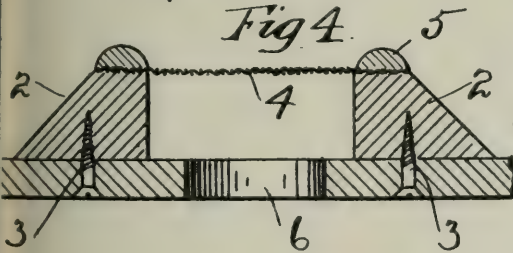


Fig 7.

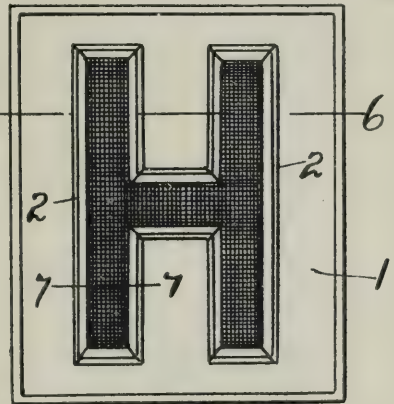
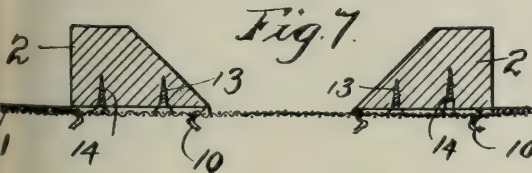
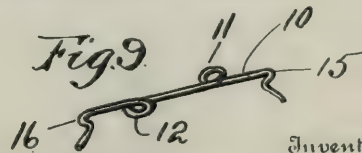


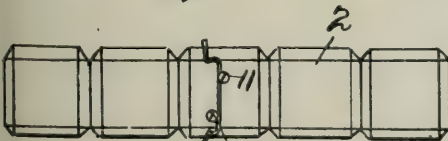
Fig 9.



Inventor

Joseph Hotchner

Fig 8.



Witnesses

George L. Miner
Ed. J. Vanden

By

Howard E. Barlow

Attorney

UNITED STATES PATENT OFFICE.

JOSEPH HOTCHNER, OF PROVIDENCE, RHODE ISLAND.

ILLUMINATED SIGN.

SPECIFICATION forming part of Letters Patent No. 789,189, dated August 30, 1904.

Application filed April 30, 1904. Serial No. 305,786. (No model.)

To all whom it may concern:

Be it known that I, JOSEPH HOTCHNER, a resident of the city of Providence, in the county of Providence and State of Rhode Island, have invented certain new and useful Improvements in Illuminated Signs; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, and to the figures of reference marked thereon, which form a part of this specification.

This invention relates to illuminated signs, and has for its object to construct raised characters for signs so as to allow the light to shine through the center portion of said characters from the back thereof and at the same time to give the character the appearance by day of being carved from solid material, the means of illuminating being entirely concealed.

Another object is to construct the raised portion of the character by securing strips of material, such as molding or the like, to the backing, thus forming the outline of the character having a hollow center portion, said center portion being formed on or covered by gauze wire that may be gilded the same as the rest of the character and through which wire light may shine for the purpose of illuminating the sign at night. Thus the characters are made to present a handsome and rich appearance by day and are capable of being brilliantly illuminated by night by means that are concealed and away from the action of the wind and weather.

With these and other objects in view the invention consists of certain novel features of construction, as will be more fully described, and particularly pointed out in the appended claims.

In the drawings, Figure 1 is a front view of my illuminated sign, showing the letter "H" with its center portion covered with gauze wire, said wire being partly broken away to show the holes through the backing of the sign through which light may enter to illuminate said letter. Fig. 2 is a longitudinal section of said sign on line 2 2 of Fig. 1. Fig. 3 is a transverse section on line 3 3 of Fig. 1, showing the light-reflector on the interior

of the hollow box. Fig. 4 is an enlarged transverse section on line 4 4 of Fig. 1, showing the hollow portion of the letter and gauze wire across its outer face covering said hollow portion. Fig. 5 is a modification showing a front view of a letter constructed on a gauze-wire background, said letter being formed in outline by securing molding or strips of material on said background, the surface of the main portion of said background being painted or the mesh being otherwise filled in, leaving the gauze wire in the center portion of the letter only, the mesh of said center portion being left open to allow the light to shine therethrough. Fig. 6 is a transverse section on line 6 6 of Fig. 5, showing the lamps and means of reflecting the light therefrom. Fig. 7 is an enlarged view on line 7 7 of Fig. 5. Fig. 8 is a detail view showing the construction of a special design of sectional molding which may be used in the construction of the outline of letters, also illustrating the means of attaching said molding to the wire background. Fig. 9 is an enlarged view in detail showing a wire clamp or fastener by which the molding is secured to the wire background.

In the drawings, Figs. 1 to 4, inclusive, show one manner of constructing the backing, in which 1 is the background formed into the shape, preferably, of a thin hollow box having two broad flat faces and which may be constructed of wood or any other suitable material. On two of the faces of this box are secured raised characters, the letter "H" being shown in the drawings. This letter is formed in outline on the backing 1 by strips of molding 2 or the like, having beveled edges, said strips being secured to said backing by screws 3 or other suitable fastenings. Across the top face of this letter is secured gauze wire 4 or other similar material, which is held in place around the top edge of said letter by screws or nails, the heads of said fastenings then being covered by the molding 5. At 6 are holes or apertures made through the backing for the admission of light to the center portion of the letters from within the box. Inside of this box and on each of two of its sides is placed a row of electric lights 7 7, back of which lights is arranged a

which may be made of metal or other suitable material. This reflector throws the light from said lamps toward the center of the hollow box and through the apertures 6, causing the face of the letter to be brilliantly illuminated. It is found in practice that the light as it comes through the apertures 6 into the hollow portion of the letter is diffused by the fine mesh of the gauze wire, and the light is nicely distributed over the face of the letter.

Figs. 5, 6, and 7 illustrate another manner of forming the background for the letters. The broad idea of constructing the raised letter in outline on the backing and providing the center portion of the letter with gauze wire, through which light may shine, is the same as the letter described above. In these figures, however, the construction of the background is illustrated as being made entirely of gauze or wire of a fine mesh, and to this wire background is secured the strips of material 2, which form the outline of the letters. After the letters are secured to this backing 1 the background is painted over or the mesh otherwise filled in all around said letters, making the surface opaque, the mesh in the gauze in the center portion of the letter not being filled in, but simply gilded to compare with the rest of the letter and to allow the light to shine through that portion only. In this letter (see Fig. 7) the molding may be beveled inwardly to the wire-gauze, which is located at the bottom of the hollow center portion of said letter. The molding or strip of material used in the forming of my raised sign-letters, as above described, is preferably constructed in sections, each section or block being partially separated from the whole strip, that may be easily broken apart, as illustrated in Fig. 8. These sections may be made in a great variety of forms, either spherical, rectangular, square, oblong, or, in fact, any shape desired. The different sections, owing to the construction of the strip, may be readily disengaged at the point desired, thus facilitating the construction of this herein-described form of letters.

To facilitate the attaching and detaching of these letters to and from the wire backing, I have constructed the fastening device. (Best illustrated in Fig. 9 at 10.) The fastener is preferably made of wire bent so as to form two eyes 11 and 12. These eyes are formed one on each side of the main portion of the wire, so that when the fastening-screws 13 and 14 (see Fig. 7) enter the wood there-through they will be out of line with each other to prevent splitting the letter. The ends of the fastener are bent down, forming shoulders 15 and 16, which enter the mesh of the wire backing, and the letters are thereby securely held in place and may also be readily detached from said background.

My construction of an illuminated sign is extremely simple, inexpensive, and practical. By the arrangement of lights within the hollow box and the reflector behind them the light is thrown into the center of the letter, which is thus brilliantly illuminated. The lights thus arranged are completely hid from view when the sign is in position and always under cover and protected from the action of the weather, the essential feature of my construction being that the letters by day present the handsome and showy appearance of solid carved raised letters without showing any means of being illuminated by night. By securing these letters to a wire backing the sign is made very light in weight, one face of which may be hinged, if desired, so as to be swung open, making it possible to get at the interior of the sign for repairs without having to take the sign apart. The letters made by my improved construction will not warp or break, as the molding that forms their outline always runs lengthwise of the grain.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. In a device of the character described, a background, raised characters secured to said background and gauze wire covering the middle portion of said characters for the purpose of illuminating said characters from the back thereof.

2. In a device of the character described, a backing, characters raised in outline on said backing and gauze wire covering the middle portion of said raised characters for the purpose of illuminating said characters from the back thereof.

3. In a device of the character described, a backing, characters raised in outline on said backing forming a hollow center portion, and gauze wire covering said hollow center portion for the purpose of giving said character the appearance of a raised carved letter and also to admit light therethrough from the back.

4. In a device of the character described, a backing, a character raised in outline by strips of material placed around its outer edge, said strips being secured to said backing forming a hollow center portion between the said strips, and gauze wire covering said hollow center portion for the purpose of giving it the appearance by day of a raised carved character and also to admit light therethrough from its back by night.

5. In a device of the character described, a backing constructed of gauze wire, a character raised in outline by strips of material placed around its outer edge, and means for securing said strips to said backing to form a hollow center portion between the said strips, the mesh of said wire background being filled in all around the characters leaving a gauze-wire

center portion for the purpose of admitting light from the back to illuminate the face of said characters.

6. In an illuminated sign, a hollow box, 5 lamps within said box, a reflector for throwing the light from said lamps toward the center of the box, a raised character in outline on the face of said box, gauze wire covering the middle portion of said raised character for the 10 purpose of allowing the light to shine there-through and illuminate the face of said character.

7. In an illuminated sign, a hollow box, lamps within said box, means for reflecting 15 the light from said lamps toward the center of said box, one or more of the faces of said box being covered with gauze wire forming a background, and characters raised in outline and secured to said background, the mesh of the 20 wire background being filled in making the same opaque leaving openings only through the gauze wire in the center portion of the

raised characters for the purpose of admitting light to illuminate the face of said characters.

8. In an illuminated sign, a hollow box, 25 lamps within said box, means for reflecting the light from said lamps toward the center of said box, one or more of the faces of said box being covered with gauze wire forming a background, and characters raised in outline on 30 said background by strips of material leaving a hollow center portion, the mesh of the wire background being filled in making the same opaque, leaving openings only through the gauze wire in the center portion of the raised 35 characters for the purpose of admitting light to illuminate the face of said characters.

In testimony whereof I have hereunto set my hand this 29th day of April, A. D. 1904.

JOSEPH HOTCHNER

In presence of—

HOWARD E. BARLOW,
E. I. OGDEN.

Defendants' Exhibit "R."

[Endorsed]: No. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "R." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

R. W. CLARK.
SIGN.

APPLICATION FILED AUG. 24, 1903.

NO MODEL.

Fig. 1.

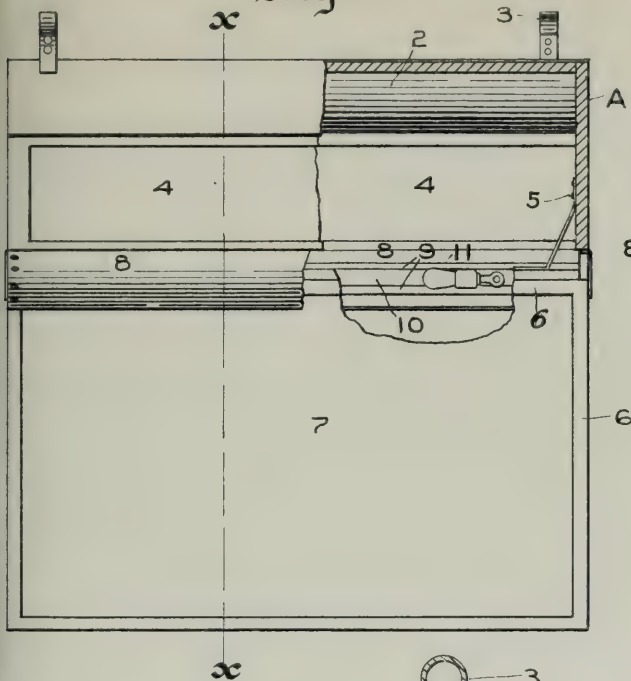


Fig. 2.

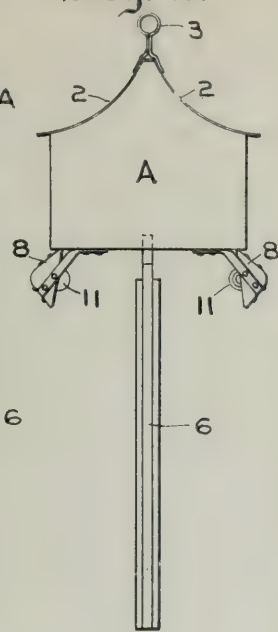
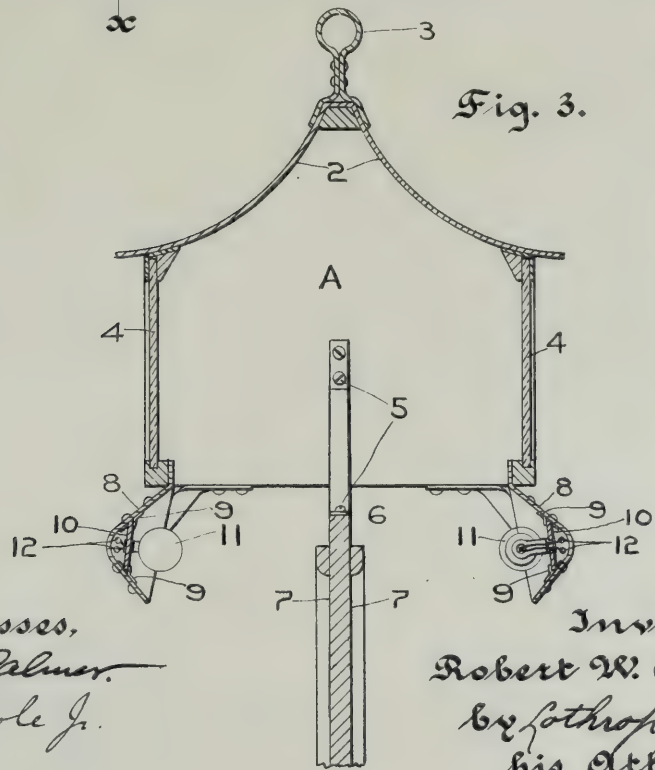


Fig. 3.



Witnesses,
W. H. Palmer.
H. B. Cole Jr.

Inventor,
Robert W. Clark.
By *John H. Johnson*
his Attorneys.

ROBERT W. CLARK, OF ST. PAUL, MINNESOTA, ASSIGNOR OF ONE-HALF
TO HENRY J. GILLE, OF ST. PAUL, MINNESOTA.

SIGN.

SPECIFICATION forming part of Letters Patent No. 775,295, dated November 22, 1904.

Application filed August 24, 1903. Serial No. 170,532. (No model.)

To all whom it may concern:

Be it known that I, ROBERT W. CLARK, a citizen of the United States, residing at St. Paul, in the county of Ramsey and State of Minnesota, have invented certain new and useful improvements in Signs, of which the following is a specification.

My invention relates to improvements in signs, its object being particularly to provide improved means for supporting and illuminating oppositely-disposed transparent signs and an intermediate display-sign.

To this end my invention consists in the features of construction and combination hereinafter particularly described and claimed.

In the accompanying drawings, forming part of this specification, Figure 1 is a front elevation of my improved sign, partially broken away. Fig. 2 is an end elevation of the same, and Fig. 3 is a section on line *xx* of Fig. 1.

In the drawings, A represents a bottomless frame or hood of general inverted-U shape in cross-section, having a top 2 and supporting-hangers 3. In the opposite sides of the hood are transparent signs 4. Centrally supported in the framework in a suitable manner, as by means of the screws 5, is a downwardly-extending display-sign 6, having upon opposite sides suitable display-surfaces 7. In order to throw rays of light through the transparent signs, as well as against the display-sign, I provide the lamp-supporting plates 8, depending from the framework below the transparent signs. The plates 8 are preferably curved, as shown, and slidably support, as by means of guides 9, lamp-supporting slides 10. The lamps 11 are suitably supported at desired intervals upon the outer face of the slide 10, the wires 12, connected with the lamps, running through the space at the rear of the plate 10, as illustrated in Fig. 3, said wires thus being protected from injury.

In operation each reflector will throw the rays of light from its supported lamps against the adjacent display-surface and through the hood above the display-sign to the opposite transparent sign. The other reflector will similarly light the display-surface adjacent to it and the transparent sign upon the opposite

side of the frame. The lamp-supporting slide 10 will act as one facet of the reflector-plate.

Having now described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. The combination, with oppositely-disposed transparent signs and an intermediate display-sign, of illuminating means upon each side of said display-sign, and a reflector arranged in position to throw rays of light from said illuminating means against the adjacent surface of said display-sign, and against the opposite transparent sign.

2. In combination, with an open-bottom framework, transparent signs arranged in the opposite sides of said framework, a display-sign centrally depending from said framework, illuminating means arranged upon the opposite sides of said display-sign, reflectors arranged in position to throw the rays of light from said illuminating means against the faces of said display-sign and over said display-sign against the opposite transparent signs.

3. The combination, with a bottomless hood and a depending display-sign, of transparent signs arranged in the opposite sides of the hood, illuminating means supported by the hood, a reflector arranged in position to throw rays of light from the illuminating means against the inner face of one of the transparent signs, and a reflector arranged in position to throw rays of light from said illuminating means against one of the faces of the display-sign.

4. In combination, a bottomless hood, transparent signs arranged in the opposite sides of the hood, a centrally-depending display-sign, illuminating means supported by the hood, and reflecting means arranged in position to throw rays of light from the illuminating means against the inner faces of the transparent signs and against the faces of the display-sign.

In testimony whereof I affix my signature in presence of two witnesses.

ROBERT W. CLARK.

Witnesses:

H. S. JOHNSON,
EMILY F. OTIS.

Defendants' Exhibit "S."

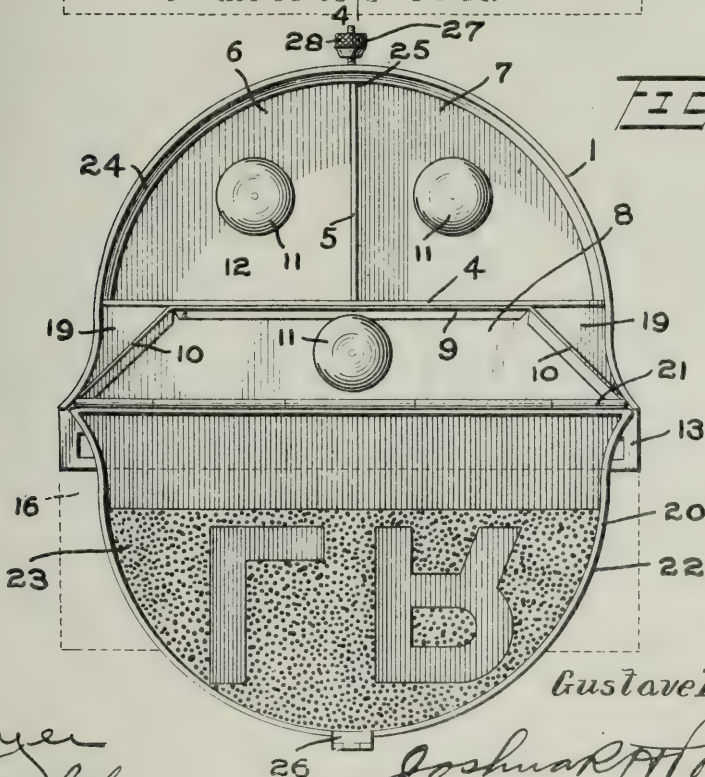
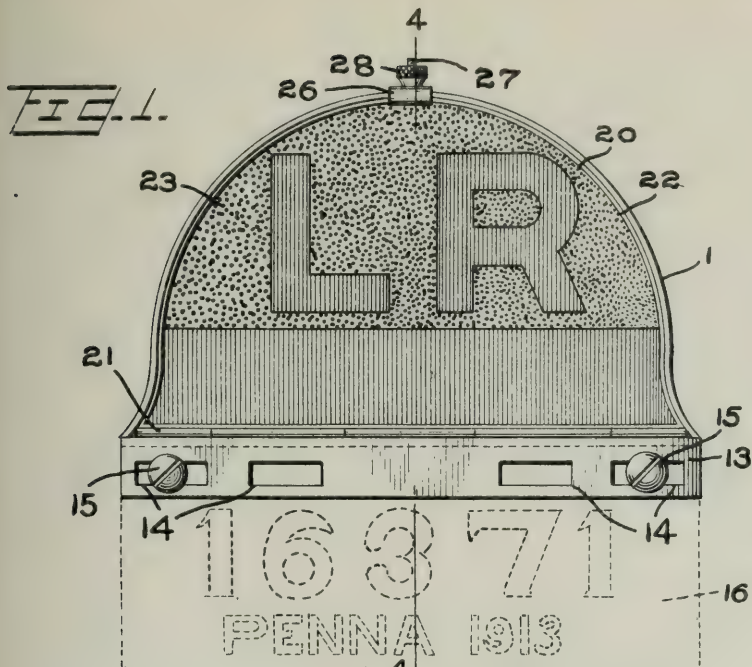
[Endorsed]: Nos. 507 and 577. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "S." Filed 12/6/21. Maling, Clerk.

No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 11, 1922. F. D. Monckton, Clerk.

,070,028.

Patented Aug. 12, 1913.

2 SHEETS—SHEET 1.



Inventor

Gustave Fortmann

Witnesses

R. Moyer
J. H. Penkel

Joshua R. Hottel

FIG. 3.

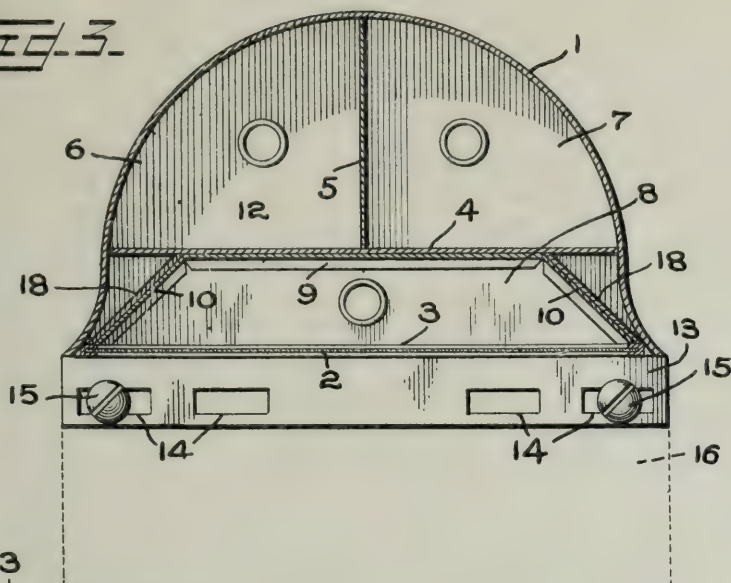


FIG. 4.

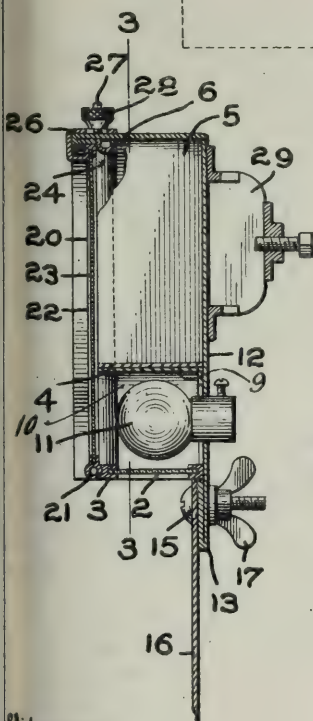
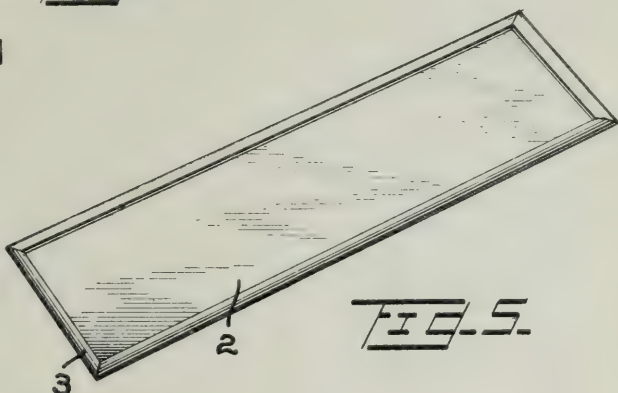


FIG. 5.



Inventor

Gustave Fortmann

Witnesses

Phoner
W. Krenkel

By *Joshua R. H. Tott*
Attorney

UNITED STATES PATENT OFFICE.

GUSTAVE FORTMANN, OF PHILADELPHIA, PENNSYLVANIA, ASSIGNOR TO AUTO SAFETY SIGNAL LAMP COMPANY, A CORPORATION OF DELAWARE.

SIGNALING DEVICE.

1,070,028.

Specification of Letters Patent.

Patented Aug. 12, 1913.

Application filed December 8, 1912. Serial No. 735,243.

To all whom it may concern:

Be it known that I, GUSTAVE FORTMANN, a citizen of the United States, residing at Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented certain new and useful Improvements in Signaling Devices, of which the following is a specification.

My invention relates to improvements in signaling devices, and more particularly to an improved combined signal lamp and license tag holder adapted to be supported on a vehicle, and which is adapted to signal to a car in the rear which direction the vehicle is to turn and also illuminate the license tag.

A further object is to so construct a device of this character as to prevent any light from getting behind the license tag and confining the rays of light directly upon the tag.

With these and other objects in view, the invention consists in certain novel features of construction and combinations and arrangements of parts as will be more fully hereinafter described and pointed out in the claim.

In the accompanying drawings: Figure 1 is a view in elevation illustrating my improved signaling device showing the license tag in dotted lines. Fig. 2 is a similar view showing the door open and thrown downward to disclose the interior construction. Fig. 3 is a view in longitudinal vertical section on the line 3—3 of Fig. 4. Fig. 4 is a view in section on the line 4—4 of Fig. 1 with a part of the vertical partition broken away, and Fig. 5 is a perspective view of the glass and its frame.

1 represents the casing of my improved signaling device which is of general semi-cylindrical form with the exception that the lower end is flared outward slightly, and is closed at its lower edge by means of a glass 2 secured in a metal frame 3, the latter fixed in the casing preferably by solder. The casing 1 is divided by a horizontal partition 4 and a vertical partition 5 into three chambers 6, 7, and 8, respectively. The lower chamber 8 has a mirror strip 9 secured therein, the intermediate portion of said strip lying against the lower face of partition 4, and the ends of said mirror strip positioned at an angle as shown at 10, so that the

light from a lamp 11 located in chamber 8 is deflected downwardly, and the rays confined within certain limits.

The back plate 12 of casing 1 extends below the casing and forms a license tag support 13. This support 13 is provided with slots 14 for the reception of bolts 15 which are projected through openings in a license tag 16, and secured by thumb nuts 17. When the license tag is in position, the reflector strip 9 with its ends 10 serves to throw the light directly upon the tag, and as the tag is secured to the support 13 constituting a portion of the back plate, no light can get behind the tag, and hence the light will be only on the face of the tag, so that its number may be readily seen at night.

The ends 10 of the mirror strip 9 are reinforced by packing strips 18, and this construction is hid from view by covering plates 19 which also strengthen the construction.

A door 20 is connected at its lower edge by a hinge 21 with the frame 3 of glass 2. This door conforms in shape to the shape of the casing, and comprises an outer metal frame 22 confining a glass 23. This door when closed, fits snugly inside of the casing and bears against the plates 19 and against a rounded bead 24 secured to the inner face of the casing and extending through a recess 25 in partition 5. In other words, a continuous surface is provided inside the casing against which the metal frame 22 of the door bears, and at the free edge of said door, a bifurcated tongue 26 is located and engages a screw 27 on top of the casing, and is securely locked by means of a thumb nut 28 which is jammed against the same.

Each of the chambers 6, 7, and 8 is provided with an incandescent lamp 11, and these lamps are connected electrically by suitable controlling mechanism adjacent the driver or chauffeur, so that he can cause the lamps to become illuminated at will. The lamp 11 in chamber 8 is always lighted at night. The glass 23 in the door 20 is rendered partly opaque, and the rest of the glass is red, so that it shows red in front of chamber 8, and red letters "L" and "R" in front of chambers 6 and 7 respectively. Of course, this color might be changed to suit conditions, but it is preferable to have the red in front of chamber 8 which shows

the customary danger signal at the back of the car.

The letters "L" and "R" indicate that the vehicle is to turn to the left or right, and the chauffeur causes the lamps to become illuminated to signal to the car in the rear his intention.

On the back of the casing, a bracket 29 is secured, and is adapted to secure the signaling device to any approved supporting bracket on a vehicle. It will therefore be noted that my improved signaling device dispenses with the necessity for any rear light in addition to its function of signaling; and furthermore the construction above set forth insures a clear illumination of the license tag.

Various slight changes might be made in the general form and arrangement of parts described without departing from my invention, and hence I do not limit myself to the precise details set forth, but consider myself at liberty to make such changes and alterations as fairly fall within the spirit and scope of the appended claim.

Having thus described my invention, what

I claim as new and desire to secure by Letters Patent is.

A signaling device of the character described, comprising a casing of semi-cylindrical form and having a flared lower end, and a flat transparent bottom secured in said flared lower end, horizontal and vertical partitions dividing said casing into three chambers, lamps in said chambers, a door closing the front of said casing and containing signaling characters in front of the two upper chambers, a license tag support on the bottom of said casing at the rear thereof, and a mirror strip secured within the lower chamber with its intermediate portion against the horizontal partition and its ends at an angle extending to the lower edge of the casing, substantially as described.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

GUSTAVE FORTMANN.

Witnesses:

R. H. KRENKEL,
CHAS. E. POTTS.

In the United States Circuit Court of Appeals, in
and for the Ninth Circuit, Northern District
of California.

JOSEPH HOTCHNER,

Plaintiff,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation,

Defendant.

**Stipulation Re Translation of French Patent No.
334,837.**

IT IS HEREBY stipulated by counsel for each
party hereto that the annexed translation is a true
translation of the French patent No. 334,837, dated
August 25, 1903, and granted to Hector Very.

CARLOS P. GRIFFIN,
Attorney for Appellant.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for Appellee.

Dated: San Francisco, California, this 3d day of
August, 1922.

[Endorsed]: No. 3860. United States Circuit
Court of Appeals for the Ninth Circuit. Filed
August 3, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 3860.

JOSEPH HOTCHNER,

Appellant,

vs.

FEDERAL ELECTRIC COMPANY et al.,

Appellees.

**Order Re Withdrawal from Files of French Patent
Patent No. 334,837 for Purpose of Translation.**

Good cause therefor appearing, it is hereby ORDERED that Mr. Carlos P. Griffin, counsel for the appellant, be and hereby is allowed to withdraw from the files Defendants' Exhibit "G" (French Letters Patent No. 334,837, in three parts, photographic copy), for the purpose of translation of said exhibit, the said exhibit and translation to be returned to the files within five days from date.

Dated: San Francisco, California, July 31, 1922.

WM. W. MORROW.

United States Circuit Judge.

Received the above-mentioned exhibit agreeably to said order.

CARLOS P. GRIFFIN,
Counsel for the Appellant.

[Endorsed]: No. 3860. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 31, 1922. F. D. Monckton.

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH HOTCHNER,

Appellant,

vs.

FEDERAL ELECTRIC COMPANY, a California
Corporation,

Appellee,

and

JOSEPH HOTCHNER,

Appellant,

vs.

R. E. MORGAN and P. C. LONG,

Appellees.

Brief for Appellant

Upon Appeals from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

CARLOS P. GRIFFIN,
711-714 Pacific Bldg., San Francisco, Cal.,
Attorney for Joseph Hotchner, Appellant.

FILED

OCT 9 - 1922

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IN THE
United States
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Appellant,
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R. E. MORGAN and P. C. LONG,
Appellees.

BRIEF FOR APPELLANT.

PRELIMINARY STATEMENT.

This appeal is a consolidation of two cases, one, the case of Hotchner vs. Federal Electric Company, and the other, Hotchner vs. R. E. Morgan and P. C. Long, both of which were tried by his Honor Judge Rudkin, as one case.

In the Federal case, United States letters patent No. 1,259,237 dated March 12, 1918, and letters patent No. 1,315,187, dated September 2, 1919, upon electric signs, are involved, the sign in question having the matter of each patent in conjoint use.

In the Morgan and Long case, letters patent No. 1,259,237 alone is involved.

Both of these patents were filed in the United States Patent Office October 19, 1914, and that date forms an important part of the case, as will be later shown.

ASSIGNMENT OF ERRORS.

The Assignment of Errors in the Federal case is as follows: The Honorable District Court erred in dismissing the complaint herein as follows:

1. In holding the patent No. 1,259,237 is void when only claim 4 was in issue in said action.

2. In holding that patent No. 1,315,187 is void when only claims 1, 2 and 3 were in issue herein.

3. In holding that claim 4 of patent No. 1,259,237 is void.

4. In holding that claims 1, 2 and 3 of patent No. 1,315,817 are void.

5. In holding that even if said patents are valid that neither of them are infringed.

6. In holding that combination claims are void because their several elements may be found separately in the prior art.

7. In holding that any patent in the record negatives the patentable novelty of the claims in issue in either patent herein.

8. In holding that any public use of a sign alleged to have anticipated the claims of either or both patents was sufficient but had to be proven.

9. In holding that any public use of any sign offered in evidence herein was an anticipation of any claim in issue in either patent.

10. In making the following decision: "The claim that a (See Record, 265) person in this day and age can gain a monopoly on the right to use raised letters in an electric sign, or upon the mere mode employed to throw rays of light from such sign upon a sidewalk is to my mind utterly unfounded. The complaints in both cases are therefore dismissed."

11. In dismissing the complaint at the cost of plaintiff.

12. In not holding both of said patents valid and infringed.

The Assignment of Errors in the Morgan and Long case is substantially identical with the Assignment of Errors in the Federal case, excepting only that but one patent is involved in that case. These Assignments of Error are found at pages 343 and 351 of the record.

THE INVENTION.

The two patents here involved disclose and claim electric signs of a certain type in which the lamps are installed within the body of the sign.

Letters patent 1,259,237 shows and describes a box-like structure made of metal with a raised molding around the elements of the letter to produce the letter form.

At the back of this raised molding there is a sheet of translucent material to fill up the letters space between the raised moldings. This translucent material is then illuminated by lamps within the sign.

Claim 4 of this patent is the only claim that was alleged to be infringed, and the case was tried with that statement made at the beginning of it.

Claim 4 of this patent is—A sign comprising a sheet metal body with a raised molding formed therein to define a character, a sheet of translucent material covering the entire area of the space bounded by the greatest length and breadth of the letter back of the same the edges of the molding toward the center of the elements of the letter lying substantially in contact with the translucent material, and means to illuminate the translucent material and through which the light shines.

The second patent discloses and claims a somewhat similar box-like structure, but which structure is specially provided with lamps for illuminating the sidewalk below the sign. These lamps are installed in a trough formed in the lower edge of the sign body and the relation of this trough to the lamps must be such as to conceal the sidewalk lights from a person looking at the sign from a distance in order to prevent losing the effect of the sign itself.

Another object of the trough for illuminating the sidewalk is to aid in affording a reflector for illuminating the letters themselves in the body of the sign, so that the trough not only accomplishes the

sidewalk illumination but aids in improving the illumination of the letters of the sign, but this is only one object of the sidewalk reflector.

The claims involved in this case are as follows:

1. In an illuminated sign, a sign body, a lamp located within said body to illuminate a character carried thereby, a lamp below the first lamp to illuminate the sidewalk below the sign, and means intercepting the rays from the latter light when the sign is observed at some distance horizontally therefrom.

2. In an illuminated sign, a sign body, a translucent character carried thereby, a concealed light to illuminate said translucent character, a reflector below the lamp to direct the light from said lamp through the character, and another light upon the opposite side of said reflector from said first lamp for illuminating the sidewalk below the sign.

3. In an illuminated sign, a sign body, a translucent character carried thereby, a lamp within the sign body to illuminate the character, a reflector to direct the light from said lamp through the character, and another light adjacent said reflector so placed that the rays therefrom will strike the opposite side of the reflector and illuminate the sidewalk below the sign.

The patents in question are shown at page 372 and 376 respectively of the record. More than 25 United States and foreign patents were set up as anticipating the claims in issue, but only 15 of them were offered in evidence, and of these Wortley,

No. 1,128,741, dated February 16, 1915 is five months later than the filing date of either patent so that it is not applicable to any claim in issue herein (Rec. page 417).

Similarly Harris No. 1,238,763, September 4, 1917, was not filed until a year and 4 months following the filing date of both patents so that it is not applicable to any claim in either patent as a reference. (Rec. page 438).

In addition to the patents, a number of public uses were also alleged as anticipating patent No. 1,259,237, but no sign was shown to be in public use which in any way resembled the sign shown in patent No. 1,315,187, although something was said by some of the witnesses that it was common to make signs open at the bottom, as if such a statement as that could anticipate the claim of a patent.

THE EVIDENCE

Taking up the evidence in the order of its introduction plaintiff's exhibits 3 and 4 are photographs of the sign made by Morgan and Long (See page 39 of the record and the following page for a description of the sign).

There is no testimony whatever in the record, at any place to contradict this testimony and obviously there could not be for it is apparent upon an examination of the photographs that the "lunch" sign made by Morgan and Long is substantially identical with claim 4 of the patent No. 1,259,237 which it is alleged to infringe.

Plaintiff's exhibits 5 and 6 (see page 41 of the record) show a sign made by the Federal Electric Company installed at 11th and Broadway, in Oakland. There is some contradictory testimony about these signs, but no one can look at them and fail to see the raised molding surrounding the edge of the letter and the trough in the bottom of the sign body which houses the lights for illuminating the sidewalk, made in accordance with the claims in issue.

Another photograph of these same signs is plaintiff's exhibit 7.

THE PATENTS IN EVIDENCE

The Murray patent—(page 380)—shows an electric sign of a box like character with a plurality of raised lips struck out of the face of the sign, the openings thus produced allowing some light to escape from the interior of the sign body.

The claim in issue is a very specific one having the following elements (page 374):

- (1) Sheet metal body.
- (2) Raised moulding to define a character.
- (3) Sheet of translucent material back of letter covering entire back of letter.
- (4) Edges of moulding substantially in contact with translucent plate.
- (5) Means to illuminate the character.

It is obvious on comparing the above claim with the Murray patent that it has no such moulding at all and obviously no moulding edge that could contact with the translucent material.

The Bock patent shows simply and only a window sign made up of tinfoil (page 386, lines 95 et seq.). This letter is a mere transparency glued or fastened on a glass window pane.

The Muller-Thym patent—(page 388)—simply shows a letter with a raised rim around the letter, in the recesses of which pieces of glass are secured. This is not the way the glass is put in the patentee's sign at all. If this sign was provided with sheets of glass such as applicant uses there would be a pocket all around the letter to collect dust and dirt of all kinds.

The Amy patent—(page 392)—is somewhat the same as the Muller-Thym patent. It certainly does not show a raised moulding such as the patentee has disclosed.

The Very patent—(page 400 of the record)—bears not the remotest resemblance to the sign made under the claim in issue. It is apparent that it is nothing more than a built-up-glass letter consisting of a series of separate glass plates.

The Genies patent—(page 406)—is simply and only a sort of spot light for illuminating a sign or number plate on an automobile, it is in no way like the signs shown in the patent here in issue.

The Thorne patent—(page 422)—shows an enclosed transparent sign with a flat front. The letters are not raised nor does it have any lamps for sidewalk illumination. What it was placed in evidence for is impossible to understand.

The Clark patent—(page 426)—shows a headlight dimmer with a series of holes punched in it to produce letters, and to illuminate something in front of the headlight. It is a sign, but it does not have anything like any element in any claim in issue herein.

The earlier Wortley patent of 1911—(page 430)—consists of a box-like sign below which are a series of bell-like members carrying letters. The top line reads “DOE” and the lower line reads, “CLOTHING.” In common with the later Hotchner patent it lights the sidewalk, but does just exactly what that patent prevents, i. e. shows light from the lower lamps to an observer at a distance horizontally therefrom. This patent, of course, has nothing to do with the raised moulding sign.

The Wiley patent—(page 441)—is for a box-like sign body with raised glass letter fronts. It does not in faintest degree compare with the sign described in claim 4 of the earliest Hotchner patent, and has nothing in common with the other patent at all.

The Little patent—(page 451)—is dated April 30, 1861. It shows a wood front sign with recessed letters. The description is very faulty, but it obviously does not have a metal front with a raised moulding having the edges of the moulding in contact with the translucent, and also, it does not show any means for sidewalk illumination, so of course, it could not meet any one of the three claims in issue in the second patent.

The patent to plaintiff of 1904—(page 454)—was considered in the prosecution of the case in the patent office. It shows a sign on which wooden mouldings are secured to outline a letter. The patent office did not consider this patent to anticipate the limited claim in issue herein and it certainly has defects which the present invention corrects. One of the alleged public uses was on a sign in Los Angeles constructed as disclosed by this patent. See deposition of Paul D. Howse (pages 135 to 145) and the defects of this sign set forth in the deposition of W. W. Ferris (page 306) and the testimony of Mr. Hotchner (page 297). Suffice it to say this structure does not present the matter of claim 4 of the earlier Hotchner patent, and has no bearing on the later patent.

The Clark patent shows an open bottomed sign body, with a sign-board below the same. Neither the lamps nor the reflectors are placed as described in the second Hotchner patent, nor is the patented sign-body open at the bottom as is the Clark sign.

The Fortman patent shows an automobile tail light which has three compartments, each of which has a translucent cover to the rear, and one of these is open at the bottom. This is not the construction claimed, and as it is a disclosure after the time of the patentee's date of reduction to practice (see page 292 and page 319) it is not a reference against the present claims under well-known decisions.

This is the last of the paper references cited and it is apparent that none of them meet the claims in issue.

The public uses alleged consist of a sign at Los Angeles, a sign at Portland, Oregon, and a series of signs made at Denver, Colorado.

The Los Angeles sign referred to in the deposition of Paul D. Howse (pages 135 to 145) has been referred to above as being made under Hotchner's earlier patent or at least of the same kind.

The Portland sign shows on its face that its flanges around the letter are not of the kind described in the claim in which the raised moulding contacts with the translucent material.

The testimony of J. C. Zancker shows on its face that he does not know what he is testifying about (see pages 171 and 172) where he is asked if he recognizes any difference between the Hotchner signs made with one construction and the Oregon Hotel sign of another construction. He says, "I do not recognize any mechanical difference."

A mere inspection of the large Oregon Hotel sign photo and the Hotchner signs and the cuts of the patent show him to be very weak not to see obvious things. The remainder of his testimony is mere hearsay.

This leaves the signs made at Denver to be last considered. They were made by the Prismatic Sign Co. of Denver, Colo. and it is apparent from the testimony about them that only one of them, to

wit, the one made for the Denver Electrical Company was made at a date early enough to have any effect on the earlier patent. They are merely public uses at best, they must be proved with the utmost force and any discrediting facts take them out of the realm of anticipations. The Littleton Colorado sign is supported only on parol testimony and is for that reason insufficiently proven.

Mackenzie talks of a number of signs made like these signs, but only the Denver Electrical Company sign is of a date more than two years prior to the filing date of the patent in question.

There is nothing in any of the sign erecting permits placed in evidence to show that a **particular kind of sign** was installed at the date in question, and as to the Denver Electrical Co. sign the very inspector who examined the sign when it was hung, and inspected it testified that when he inspected it, it had no raised moulding such as the sign now has which was placed in evidence (see pages 315 and 316). This testimony is entitled to the greatest weight as it was given by one having no interest in the suit who is accidentally living here in San Francisco. Certainly the inspector knew as much about the sign in question as any one could.

In addition he is borne out in his statements by W. W. Ferris (pages 304, 305). It is claimed these raised moulding signs were installed in Denver about 1912 and 1913, and that they remained in the same condition from then to date. Mr. Ferris went

to Denver a number of times from 1911 to 1914 looking for new ideas in the electric sign business, and carefully observed the signs then displayed (Feb. 1914) and saw no signs of the character of the Hotchner patent.

The patented sign is usually referred to under its trade name "The Luminous Sign;" and he says at all the places mentioned as having signs with raised mouldings installed earlier than 1914, that he saw no such signs at the Denver Electric Co. store, May's Department store, 516 Sixteenth St. at 757 Broadway. He passed these places both in the day and at night looking for new ideas. Surely if such a thing was then installed he would have seen it.

This sort of testimony from persons in the trade is acceptable to prove that such a thing was not known at that time, (see *Shirley vs. Anderson*, 8 Fed. 905) in which it was held that "testimony that a firm made thousands of dozens of the article in question is not sufficient where none of the articles were produced and where men of the trade testified that they never saw such a thing." (See also *Kraatz vs. Tienmann*, 79 Fed. 321).

In *Haughey vs. Myer* it was held that "although considerable evidence was introduced, the fact that he was unable to produce a single device antedating the patent deprived his evidence of that certainty necessary to overthrow a patent." **Here the single article produced is stated by its inspector to be in a different form from that which it was in when in-**

stalled. See Mr. Thorne's testimony page 313. This is sufficient to completely discredit this testimony.

The courts hold that to prove want of novelty, "that every reasonable doubt should be resolved against the party asserting want of novelty."

Kinnear Co. vs. Capital Co., 81 Fed. 491, and the Supreme Court said in Deering vs. Winona, 155 U. S. 286:

"Granting witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented may differ from it in the very particular which makes it patentable, is such as to render oral testimony peculiarly untrustworthy particularly so if the testimony is given after the lapse of years from the time the alleged anticipating device was used. If there be added to this a personal bias, or an incentive to color the testimony in the interest of the party calling the witness, to say nothing of downright perjury, its value is, of course, still more impaired." To the same effect is the

Barbed Wire patent case, 143 U. S. 275.

"In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required

that the proof shall be clear, satisfactory and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defence of a prior use of the thing patented goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer."

Many cases express the same ideas of which see *Wetherell vs. Keith*, 27 Fed. 364; *Hawes vs. Antisdale*, Fed. case 6234; *American Co. vs. Weston*, 59 Fed. 147.

LAW POINT NO. 1.

THE DATE OF THE INVENTION

The patentee testifies that the first sign made in accordance with the patent was sold to Max Shirpser, December 5, 1913 (see page 293) and that both inventions were originally made in 1910, at the factory 837 Ellis Street. Mr. Meeks corroborates this

testimony as to the making of the signs in 1910 (see page 319).

See Ency. of Evidence, Col. 9, page 646, in which it is stated: "Where the validity of the patent is assailed on the ground of anticipation, and the party asserting invalidity has introduced evidence—of anticipation—it is proper to permit the patentee to show that prior to that date he had reduced the invention covered by his claim to practice in a working form."

This is supported by the cases of *St. Paul vs. Stanley*, 140 U. S. 184 and *Clark vs. Willimantic*, 140 U. S. 492.

It is undeniably the law today and necessitates all public use testimony to be of facts more than two years prior to the filing date of the patent application under Section 4886 of the Revised Statutes where a prior date of invention is shown.

The provision is: Any person who has invented or discovered any new and useful art machine,—not known or used by others in this country before his invention thereof—and not in public use or on sale in this country more than two years prior to his application—may—obtain a patent therefor.

This eliminates all save the Denver Electrical Co. sign and the parol proven Littleton sign from consideration here, and the former is so discredited by the testimony of the inspector of the Department of Electricity of Denver that it ought not to be accepted as sufficiently proven.

LAW POINT NO. 2.

THE DECISION GOES BEYOND THE MATTER
IN ISSUE

Claim 4 only of the earlier patent and claims 1, 2 and 3 only of the later patent were in issue, but the decision holds both patents void. This is clearly a decision beyond any issue on either patent. No evidence was introduced on either side to support any findings on claims other than those placed in issue at page 35.

It is elementary that any decree must be within the issues of the case and must have evidence to support it.

Citation of authorities should be unnecessary on such a self evident proposition. Obviously the decree should be modified to correspond with the issues in any event.

The cases of *Crockett vs. Lee*, 20 U. S. 522, *Piatt vs. Vattier*, 34 U. S. 405 and *Knox vs. Smith*, 45 U. S. 298 are authority for the statement that the relief afforded by the decree must conform to the case made out by the pleading, as well as to the proof.

It has also been held that "evidence given in an Equity suit, but not being within any issue framed by the parties, must be disregarded on the hearing, although it may have been received without objection; and a decree founded on evidence of that character will be reversed 4 Barb., 265 and see also *Cloud vs. Whiteman*, 2 Har. 401.

LAW POINT 3.

The decision upon which the decree was entered is as follows: "The claim that a person in this day and age can gain a monopoly on the right to use raised letters in an electric sign, or upon the mere mode employed to throw rays of light from such sign upon the sidewalk is to my mind utterly unfounded. The complaints in both cases are therefore dismissed."

This decision shows a total misapprehension of what the issues of the case are. The patentee claims nothing the Learned Judge sets forth in the above decision save that as to the elements which he has mentioned they happen to be parts of the complete combination set forth in the claims in issue in the two patents. The patentee does not claim a monopoly on merely a raised letter in connection with an electric sign. What he is entitled to and what he claims is set forth in the full series of elements in Claim 4 of the first patent and the full series of elements set forth in Claims 1, 2, and 3 of the second patent. It is no answer to say that because parts of the claims are old that they are void.

Combination claims must be read as a whole no element can be omitted therefrom nor can any element be added thereto.

In *Fay vs. Cordesman*, 109 U. S. 408, the Supreme Court has the following to say:

"The claims of the patents sued on in this case are claims for combinations.—If it be a claim to a

combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality." Hundreds of other cases express this same thought and it is beyond peradventure the law today.

CONCLUSION

These cases should be reversed:

1. Because it is obvious to any one looking at the signs made by both defendants that they are substantially copies of the signs disclosed in the patents, at least as to the matter covered by Claim 4 of the first patent and Claims 1, 2 and 3 of the second patent.

2. The prior patented art was fully considered by the Patent Office and nothing appears herein which follows the claims in issue of either patent.

3. The public uses alleged are either to non-pertinent facts, or else are so questionable, either because based wholly on parol, or because of direct contradiction of a disinterested witness as to be not acceptable under well known rules of patent law referred to above.

4. Most of the public use matter attempted to be proved in the case is within the two years' period prior to the applications for the patents and hence is not applicable as evidence of invalidity. In the single instance of the Denver Electrical Company sign, it is apparently two weeks or three weeks over


the two years' period, but it has been so discredited by its inspector that it should not be accepted as evidence and of course, the parol proven Littleton sign cannot overthrow a patent.

5. The patentee made and sold a sign, made in accordance with the disclosure of Claim 1, in December, 1913 and is corroborated as to the production, in 1910, of a full sized letter, which letter has been placed in evidence herein.

6. The decrees in both cases should be reversed to remove from them matter upon which not a shred of testimony was taken by either side.

7. It is not in the spirit of the patent law, nor in the trend of present day decisions to seek by technical construction all possible avenues to defeat a patent. It has been expressed in *Topliff vs. Topliff*, 145 U. S. 156, as follows: "The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by too strict and technical, adherence to the letter of the statute, or by the application of artificial rules of interpretation."

The case is respectfully submitted for reversal, with costs to appellant.


.....
Attorney for Joseph Hotchner.

No. 3860

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH HOTCHNER,

Appellant,

VS.

FEDERAL ELECTRIC COMPANY

(a California corporation),

Appellee.

On Hotchner Patents:

1,259,237—March 12, 1918

1,315,187—September 2, 1919,

Illuminated Signs.

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VS.

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BRIEF FOR APPELLEES.

CHAS. E. TOWNSEND,

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FILED

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F. D. MONCKTON

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BRIEF FOR APPELLEES.

This appeal embraces two suits against two different sets of defendants and involving different structures of different manufacturers. It was agreed that the two cases might be tried together (R. 33).

While the showing of alleged infringement by the Federal Electric Company in case No. 577 is based largely on guess-work and hearsay, there was almost a total lack of evidence going to show what the defendants Morgan and Long in case No. 507 were charged to be guilty of. We may for the purpose of this appeal assume that the structures of the different defendants are substantially the same.

The entire record of plaintiff-appellant aptly illustrates the admonition of the Court of Appeals for the 3rd Circuit in *Fried Krupp Aktien-Gesellschaft v. Midvale Steel Co.*, 191 Fed. 588:

“We deem it proper, however, to say for the guidance of patent practitioners in this circuit that it should be borne in mind that infringement is not only a question of fact, but is a tort or wrong, the burden of establishing which, as in all torts, clearly rests on those who charge such wrong. The absence of actual fact proof is not met by the presence of expert speculations no matter how voluminous.”

The plaintiff's bill of complaint charged infringement of two patents issued to the plaintiff, both relating to electric signs. The cases were tried in open court before Judge Rudkin who, after hearing the evidence and having opportunity to observe the witnesses, dismissed the bills for lack of equity.

The features of defendant's signs which plaintiff asserts constitute an infringement of his patents are so common-place that the trial Judge expressed great amazement that anyone would assert that

they were within the protection of an existing patent.

Defendant's sign, which plaintiff contends infringes his first patent, namely, Patent No. 1,259,237, of March 12, 1918, is exemplified by defendant's Exhibit W. It is made as follows: An opening of the shape of a letter is cut in a piece of sheet metal. A raised strip of molding is placed around the border of this opening solely for the sake of adornment and back of this opening is a plain sheet of glass or translucent material to let the light shine through. The court, after hearing the *prima facie* proofs of plaintiff was reluctant to believe that plaintiff's charge of infringement was based on the use of so common an expedient and the court made further inquiry as follows:

"The COURT. What is it the plaintiff claims under his patent—the exclusive right to use this? .

Mr. TOWNSEND. Apparently, from the *prima facie* case, they claim any sort of a beveled border as an infringement.

Mr. GRIFFIN. We claim the right to use any kind of a raised metal molding.

The COURT. And you claim no one else has a right to use it.

Mr. GRIFFIN. We claim no one else has the right to use the metal molding in connection with this translucent letter with the illumination in the back of the character," (Record p. 239.)

The structure which plaintiff asserts infringes his second patent, namely, No. 1,315,187, dated September 2, 1919, is shown by defendant's Ex-

hibit EE. It consists merely in arranging a trough-shaped reflector on the bottom of an interiorly lighted sign and placing a row of lamps in this reflector so that light will be reflected down on to the sidewalk. The proofs show that this has been required by the City Ordinances of various municipalities for many years prior to the filing date of the patent. The court very properly at the close of the trial ruled as follows:

“The COURT. The claim that a person in this day and age can gain a monopoly on the right to use raised letters in an electric sign, or upon the mere mode employed to throw rays of light from such sign upon a sidewalk, is, to my mind, utterly unfounded.

The complaints in both cases are, therefore, dismissed.”

The fallacy of plaintiff's case lies in this: He is grossly mistaken as to what his first patent covers, and, in regard to his second patent, he is mistaken as to what defendant is making and selling.

The defenses are:

I. With respect to Hotchner Patent No. 1,259,-237, hereinafter called the “raised molding sign”:

- (1) Non-infringement, and
- (2) Invalidity on account of
 - (a) anticipation by prior use and prior patents;
 - (b) introduction of new matter into the application after filing.

II. With respect to Hotchner Patent No. 1,315,187, hereinafter called the "sidewalk illumination sign":

- (1) Non-infringement, and
- (2) Invalidity on account of
 - (a) lack of invention in view of the state of the prior art, and
 - (b) aggregation.

Re: Patent No. 1,259,237, dated March 12, 1918: (Raised Molding Sign).

Plaintiff declares on but one claim of this patent, to wit, claim 4. That claim is as follows:

A sign comprising:

(1) A sheet metal body with a raised molding formed therein to define a character.

(2) A sheet of translucent material covering the entire area of the space bounded by the greatest length and breadth of the letter back of the same.

(3) The edges of the molding toward the center of the elements of the letter *lying substantially in contact with the translucent material*.

(4) And means to illuminate the translucent material and through which the light shines.

This claim was woven into the application some 2½ years after the filing of the application. Plainly, it requires with respect to condition or element (3) that the edges of the molding *contact* with the sheet of glass, in other words, an overhanging molding, as shown in Figs. 2 and 4 of the patent, and em-

bodied in defendant's Exhibits "X" and "Y", which plaintiff's counsel admitted to be correct representations of the drawings of this patent (R. 252 and 253).

Non-Infringement.

Defendant's sign, as will be seen by an inspection of defendant's Exhibit W, does not have a raised molding, the edge of which *contacts* with the glass or translucent material. This molding is turned outwardly and its edge lies not against the glass, but against the sheet metal body. In other words, Hotchner's molding forms a support or rest for the glass, whereas defendant's molding is merely for ornamental effect and the glass contacts only with the sheet metal body or frame of the letter.

It thus appears that even if claim 4 be valid, it is not infringed by defendant.

However, this claim is invalid for two reasons:

(a) It departs from the disclosure of the Hotchner drawings and specification; in fact, it is inconsistent with the teachings of the Hotchner patent, and

(b) It is invalidated by prior patents and prior public uses.

Re: New Matter:

The court will notice that this claim specifies particularly that the sheet of translucent material shall cover "*the entire area of the space bounded by the greatest length and breadth of the letter*

back of the same.” Now, it is a very simple matter to demonstrate that a rectangular piece of glass cannot, with but the single exception of the letter “I,” be applied to the Hotchner construction as shown and described in the said patent. In each and every example shown in the drawings and described in the specification of this patent, as originally filed, the glass is “held in place in the plane of the sheet metal front.” (see lines 53-55 in the Hotchner patent.) This applies as well to Fig. 2 as to Fig. 4 and is so stated in claims 1, 2 and 3.

The drawings as originally filed and as they now appear in the Hotchner patent show a structure wherein the sheet metal front is cut away in the shape of a letter and is formed with a raised border or molding, with a piece of glass or translucent material inserted in the cut away space and lying *in the plane of* the sheet metal front. This construction is clearly described and claimed, especially in original claim 3 which called for “a sheet of translucent material adjacent said molding resting *in a pocket* formed by the letter plate.” The disclosure was made even more particular in these respects by subsequent amendments both to the claims and specification. In a letter dated June 27, 1916, the Examiner said:

“The claims should be amended to call for a box provided with a front and to state that the translucent material is *in the plane of the front*. The specification should support the statement ‘in the plane, etc.’”

Accordingly the specification was revised to read as follows:

“This molding is pressed outwardly *far enough* so that a suitable sheet of translucent material 13 may be inserted under the molding and is held in place *in the plane of* the sheet metal front 10 by strips of sheet metal 14.”

Taken in connection with the drawing this can mean but one thing, namely, the glass or translucent material is laid within *a pocket* so that it intersects *the plane of* the sheet metal front, and in order to do so the glass must be cut in the exact shape of the letter. The first three claims of the patent all require the translucent material to be arranged *in the plane of the sheet metal front* and consequently such claims apply only to a sign wherein the translucent material or glass is cut in the *exact form* of the letter to be produced.

However, claim 4 calls for an entirely different structure and one in which the translucent material or glass is in the form of a blank sheet “covering the entire area of the space bounded by the greatest length and breadth of the letter.” This claim was an after-thought, and did not make its appearance until January 9, 1917, more than two years after the original application was filed. Prior to this amendment the specification and drawings lacked any reference whatever to a blank sheet of translucent material cut in the form of the letter so that it might be laid into the pocket formed in the front of the sheet metal body.

Claim 4, therefore, is for new matter and can find no support whatever in the original specification and drawings. It was not submitted until long after Hotchner had filed his original application and at a time when other signs had already made their appearance wherein a blank sheet of glass was used in place of one cut in the shape and form of the letter. In an endeavor to bolster up this claim the specification was amended by adding the following paragraph thereto:

“The sheet of translucent material is not cut out the shape of the letter but covers the entire area defined by the length and breadth of the letter or character. By thus making the sheet of translucent material cover the entire outer area of the character without conforming to the outline of the letter the cost of manufacture is reduced while the structure is actually stronger.”

This amendment was filed without even the support of a supplemental oath.

A moment's reflection will suffice to show that a glass cannot be placed “in the plane of the sheet metal front” of a letter unless that glass be cut to the exact shape and size of the letter (the letter “I” is the only exception). However, Hotchner's claim 4, unlike his claims 1, 2 and 3, very particularly specifies that the glass shall cover “the entire area of the space bounded by the greatest length and breadth of the letter back of the same,” intending thereby that any straight-sided rectangular glass of sufficient length and breadth to cover the overall length and breadth of the letter will suffice.

Defendant's expert, Tracy W. Simpson, pointed out this difficulty of the Hotchner patent in his testimony, and the following is quoted from his deposition (R. 268-270):

"Except where a single *block letter* I or a like solid rectangular character is used, it is mechanically impossible, according to the construction shown and the description in plaintiff's patent, to use a sheet of translucent material lying 'in the plane of the metal front,' which need not be cut out to the shape of the letter, and, at the same time, may cover 'the entire area defined by the length and breadth of the letter.' (Hotchner patent, page 1, lines 62-65). It is well known that every letter of the alphabet, except I, is either re-entrant, like the letters H, E, F, G, M, etc., or contain center like the letters R, O, A, B, P, etc., which centers must be supported. In either case the re-entrant portions or the center portions absolutely prevent the use of a plain, rectangular sheet of glass, which at the same time is to lie in the 'plane of the metal' from which the molding is stamped.

"The only way that the glass could lie 'in the plane of the metal' from which the border is stamped would be for the glass to be cut out, before being assembled into the sign, into a shape exactly like the letter, and this applies equally to a construction according to Figs. 1 and 2 or Figs. 3 and 4 of the Hotchner patent. As a matter of fact in an effort to reconcile the description in the Hotchner patent above quoted (page 1, lines 62 and 71) with the rest of the Hotchner patent specifications and drawings. I did considerable experimental work in an effort to produce a sign in which the translucent material was not cut to the shape of the letter 'but covers the entire area defined by the length and breadth of the letter

or character' and at the same time had the sheet of translucent material 'in the plane of the sheet metal front,' and it proved to be an impossibility; the only exception being where the Figure was a true rectangle like the Block Letter I or a rectangular hyphen.

"It, therefore, is seen that any reference in the specification (209) to the use of a sheet of translucent material not cut out to the shape of the letter but of an area corresponding to the length and breadth of the letter is not only erroneous but inconsistent with the rest of the Hotchner specification and with the drawings, except with respect to the single character which may be called a Block Letter I."

It is important to note that claim 4 of this patent, as well as the assertion in lines 62 to 71 of the specification to the effect that the sheet of translucent material covering the entire area defined by the length and breadth of the letter or character, could be used, were introduced for the first time by an amendment, dated January 9, 1917, more than two years after the application for patent was filed, and without the formality of filing a supplemental oath. Hotchner had evidently become familiar in the meantime with the so-called Prismatic sign (defendant's Exhibit A-6), and not realizing that such signs were a part of the prior art, he attempted by amendment to bring them within the scope of his patent, and in this he was favored by the fact that, while the new claim which he introduced would be utterly inapplicable to most of the letters of the alphabet, nevertheless, it was readable upon the letter "I" shown in his drawings.

LAW REGARDING "NEW MATTER."

The law is clear that the introduction of new matter into a patent application invalidates any claim directed thereto. This defense need not be specifically pleaded in the answer. (Michigan Central Railway Co. v. Consolidated Car Heating Co., 67 Fed. 121.) Walker, in his work on patents, sums up this defense as follows:

"That the invention claimed in the original patent is substantially different from any indicated, suggested or described in the original application therefor."

Concerning this defense Walker says, paragraph 450:

"It is not based on any expressed statute. Its foundation is the general spirit of the patent laws and it has been expounded in a number of cases, beginning with the case of Railway Co. v. Sayles, 97 U. S. 563."

In the case of Railway Co. v. Sayles the validity of Tanner's patent for a brake to apply to double trucks under railway cars was involved. The original application for the Tanner patent did not show a system which could be operated from one end of the car, but an amendment made some years later showed such a device, and it was said by Mr. Justice Bradley, delivering the opinion of the court, that if the amended application and model embodied any material addition to or variance from the original, such addition or variance could not be sustained on the original application:

“The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the meantime, any more than it does in the case of reissues of patents previously granted. The court should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration or to appropriate that which has in the meantime gone into public use.”

The decision in *Michigan Central Railway Co. v. Consolidated Car Heating Co.*, *supra*, is by Taft, Lurton and Severns, and contains an exhaustive analysis of the pertinent decisions on this point. In that case the patentee Cody was claiming a heating system for railway cars. The steam pipes beneath the cars were shown in his drawings as being parallel with the floor of the car and in a subsequent amendment he altered his specification so as to refer to inclined pipes, the purpose of which was to get rid of air pockets and condensation. The claim in suit likewise called for inclined pipes. In holding the claim invalid the court said:

“Counsel for the appellee, in discussing this subject, and excusing the insufficiency of the drawings to show this feature of the patented device, urges that they do not prevent ‘such variations in an apparatus, in form, shape, and proportions, as common sense or mechanical skill in that art would suggest. Rather, they are addressed to persons skilled in the art, who can supplement them with their technical knowledge.’ Admitting this to be so,

and to be applicable to the written specifications also, still it carries the doctrine to its verge; and if the drawings and specifications fail to indicate the device to those conversant with the art and having the mechanical skill peculiar thereto, they are insufficient, and the patent does not include the device. Applying this as a further test, and bearing in mind what has already been said by us, and claimed by the counsel for the appellee, in respect to the problem of getting rid of pockets of air and the water of condensation, the conclusion is inevitable that the taking into the combination of the element of coils of pipe so arranged as to get rid of the difficulty was something new. Would it naturally occur to one possessing merely mechanical skill to arrange the coils in the effective way shown in the patent? If so, then there was nothing new, in the nature of invention, in the matter covered by the claim, for the obvious hints to the mechanic existed in the systems proposed to be improved upon. If not, it is clear that the invention was that shown by the amendment of the specifications, and only that. The combination is useless without that feature, and the bringing it in would be the last step in reaching success. If it was invention, it was an invention not hinted at in the original application; and, if the patent is to be restricted to the substance of that application, the claim is invalid because the invention was not useful."

This same rule has been applied in numerous cases in the Federal Courts and was reiterated by the Supreme Court in the recent case of *Stewart v. American Lava Co.*, 215 U. S. 161. In the latter case the Dolan patent for a Burner Tip was in-

volved. The structure shown in the original drawings had not been altered in any respects, but the theory of operation was changed considerably by process of amendment. Mr. Justice Holmes, delivering the opinion of the court, found the patent invalid, saying:

“It appears to us plain that Dolan’s attorney introduced not merely the theory, but the mode of applying it, for the first time, in the amended specification; or, in other words, then for the first time pointed to an invention, the essence of which was to have so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit the current of gas surrounded by the greater part of such air as an envelop or film. Of course, Dolan desired to produce the result which the patented article is said to produce, but, beyond that desire, his specification did not give a hint of the means by which it now is said to be achieved. It spoke, it is true, as we have said of producing a hollow-shaped funnel flame by reason of the gas being forced through contracted openings at very great pressure. But this did not disclose the invention, and was dropped in the amendment. He made no claim for a process and disclosed no invention of a device. This being so, the amendment required an oath that Dolan might have found it difficult to take, and for want of it the patent is void.”

Hotchner’s failure to illustrate and describe the structure called for by claim 4, aside from the foregoing objection, constitutes a fatal defect in that he has not complied with the provisions of section 4888, Revised Statutes, which requires that the manner and process of making, constructing, com-

pounding and using an invention shall be described in such full, clear and concise and exact terms as to enable any person skilled in the art to make, construct, compound, and use the same. Concerning this defense Walker says:

“If a patent falls below the statutory requirement in that respect that patent is void,”

citing *O'Reilly v. Morse*, 15 Howard 62.

The case of *O'Reilly v. Morse*, as is well known, involved the Morse patent for a telegraph. Chief Justice Taney, in finding the 8th claim of the Morse patent invalid, said:

“This claim can derive no aid from the specification filed. It is outside of it and the patentee claims beyond it. And if it stands it must stand simply on the ground that the broad terms above mentioned were a sufficient description and entitled him to a patent in terms equally broad. In our judgment the act of Congress cannot be so construed.”

The case of *Pacific Cable Railway Co. v. Butte City Railway Co.*, 58 Fed. 420, is also in point. The patent in suit had to do with a turn-table for cable cars and described the use of turn-tables in duplicate. The claim was broad enough to cover the use of a single turn-table, but the description and drawings failed to show how a single turn-table might be used in transferring a car from one track to another. The court, in refusing to find infringement of the patent where a single turn-table was used, referred to the language of section 4888, and said:

“In turning to the Statute above quoted it will be seen that the manner of using an invention must be given in the description and in such full, clear, and concise and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected to use the same. While the claim may be broad enough there is no description of how one table is to be used except in connection with the other. If a claim is not properly described in a patent the claim is of no validity.”

The same facts apply to Hotchner's patent where he shows and describes one manner of constructing and assembling his sign and in claim 4 calls for a structure quite different and in fact repugnant to the one shown and described. There is no full, clear and concise description of the manner in which he constructs a sign such as is called for in claim 4, and hence under the Statute the claim is invalid.

Re: Prior Art:

This brings us to a consideration of the prior art, and more especially to the Prismatic Signs above referred to.

The Prismatic Sign was designed and built by the Prismatic Sign Company, of Denver, Colorado, a firm consisting of Archibald MacKenzie and Thomas M. Norton. The depositions of both partners, as well as that of Clark Rider, the user of one of the said Prismatic Signs, are in the record (pp. 81 to 134). The character of the letter therein is

shown by defendant's Exhibit A-6, which is one of the letters taken from a sign erected by the Prismatic Sign Company, in Denver, Colorado, on or about October 15th, 1912, which is more than two years prior to the filing of the application for the Hotchner patent.

An examination of this exhibit will show that it is in all essentials like defendant's signs, and that it has a raised molding forming the border of the letter and that it is backed by a sheet of glass or translucent material covering the entire area of the space bounded by the greatest length and breadth of the letter.

If defendant's sign comes within the scope of Hotchner's claim 4, then so does the Prismatic Sign (defendant's Exhibit A-6), and, since it is axiomatic that that which infringes, if later, invalidates, if earlier, then Hotchner's claim is invalid.

In regard to the date of the erection of the Prismatic Sign (defendant's Exhibit A-6) plaintiff's counsel stated to the court (R. 316):

"I might say, your Honor, in respect to this particular sign, this is the only sign whose public use is proved definitely as being more than two years prior to the filing date."

Plaintiff then produced a single witness, namely, C. B. Thorne, in an effort to show that the raised molding forming a part of the Prismatic Sign in evidence had been put on after the sign was erected. Thorne's testimony was to the effect that he was a Deputy Electrician for the City of Denver in 1912,

and as such inspected a sign in front of the Denver Electrical Company, which sign, according to his recollection, did not have a raised molding around the letter. On cross-examination Thorne admitted that he had inspected but one sign in front of the Denver Electrical Company, whereas the record shows that the Denver Electrical Company purchased two different signs from the Prismatic Sign Company at or about this time, one with raised molding and one without.

The proofs bearing upon the origin of this sign, defendant's Exhibit A-6, are overwhelming. At a session in Denver, Colorado, the following witnesses were called by defendant: Otis B. Spencer, Archibald MacKenzie, Thomas M. Norton and Clark Rider.

Spencer is Permit and Certificate Clerk in Department of Improvement of Parks, City of Denver, and has been so engaged for some twelve years or more. He produced his official records showing applications for permits to erect electric signs; also certificates of electrical inspection pertaining thereto. The following were read into the record: Permit No. 2894 pertaining to the New York Floral Co. sign, showing application for permit, dated July 29, 1912, and issuance of permit, including certificate of inspection, dated August 17, 1912. Exhibit A-1 is a copy. This permit was prepared under the hand of Spencer and Exhibit A-7 is a photostat of the original permit. Permit No. 2951 covering DuBois sign showing application dated

August 27, 1912, and issuance of permit, including certificate of inspection, dated September 3, 1912. Exhibit A-2 is a copy of same prepared under the hand of Spencer and Exhibit A-8 is a photostat of the original Permit No. 3794 relating to the Denver Electrical Co. sign showing application dated July 31, 1912, and issuance of permit, including certificate of inspection, dated October 14, 1912. Exhibit A-3 is a copy of same prepared under the hand of Spencer and Exhibit A-9 is a photostat of the original. (Record pp. 65-80.)

McKenzie, who testified in San Francisco, resumed his testimony in Denver and identified the applications for permits referred to in the deposition of Spencer, and testified that said applications were in his handwriting and were prepared on the dates shown on the upper right-hand corners thereof. McKenzie described the signs in detail and testified that the New York Floral Co. and DuBois signs were no longer in existence, but that the Denver Electrical Co. sign was still in use and in nowise changed in construction. At the request of defendant's counsel an adjournment was taken to inspect Denver Electrical Co. sign, and the letter "O", occurring in said sign, was removed and offered in evidence as Exhibit A-6. (Record pp. 81-85 and 127-128.)

Norton was a partner of McKenzie in Prismatic Sign Co. and recalled the Denver Electrical Co., New York Floral Co. and DuBois signs referred to in the foregoing permits. He described the pro-

cedure necessary to get a permit to erect a sign in Denver, stating that the sign must be completed and inspected before the permit is granted. After the permit is granted the sign is hung within two or three days. He identified the Denver Electrical Co. sign by reference to photographic Exhibit A-4 and sample Exhibit A-6, stating that it was the same as when originally hung and that the New York Floral Co. and DuBois signs referred to above were of identical construction. (Record pp. 85-105 and 124-126.)

Rider is the owner of the Denver Electrical Co. He testified that the sign shown in photograph Exhibit A-4 and sample Exhibit A-6 was hung in front of his place of business about October 15, 1912, by the Prismatic Sign Co. and that the said sign had not been altered in construction since that time. (Record pp. 105-124.)

Defendant's witnesses, MacKenzie, Norton and Rider all testified that within a space of several months two different signs were erected for the Denver Electrical Company containing substantially the same reading matter, one with raised molding and the other without. The sign from which defendant's Exhibit A-6 was taken is shown by the official records of the City of Denver to have been inspected and approved on the 14th day of October, 1912, the application for permit to hang the same having been applied for on July 31, 1912. (Def'ts Exhibit A-3.)

The sign which did not have the raised molding was erected some six months earlier. Mr. MacKenzie's testimony on this was as follows (R. 178-180):

"Q. You stated that you erected a second sign for the Denver Electrical Co. When was it erected?

A. About six months later, to the best of my recollection.

Q. How did these two signs compare which were erected for the Denver Electrical Co.?

A. The first sign we erected for them was for an electrical show in the auditorium; after we got through with that we hung one over their door, their working place, their shop where they made the fixtures, and had us make a more elaborate one later to go over their showroom.

Q. Were the two alike in construction and appearance?

A. One had a rim-letter; the first sign did not.

Q. By a rim, what do you mean?

A. A metal flaring border around the letter.

Q. Which one had the flaring metal border around the letter? A. The latter one.

Q. That was erected, you say, approximately six months after the first one?

A. I say in June or July, along there, 1912."

It is further to be noted that all three witnesses, namely, MacKenzie, Norton and Rider testified that no changes whatever had been made in the sign (defendant's Exhibit A-6) since the time it was erected, except to paint the same. Surely the testimony of a single individual having but a casual knowledge of one of two signs bearing the same legends cannot in any way cast doubt upon the

testimony of three others who were familiar with both signs and took part in erecting and maintaining the same.

OREGON HOTEL PRIOR USE.

There has also been introduced in evidence photographs of the Oregon Hotel sign (defendant's Exhibit DD) which also embodies the essential features of both plaintiff's and defendant's signs. Its border or outline molding is somewhat differently shaped, but it has a raised effect and it has a glass back of the character covering the entire area of the space bounded by the greatest length and breadth of the letter, and also is lighted from the interior. The date of erection of this sign is fixed by the witnesses Heft, Zancker and Anderson as having taken place in September, 1911.

LOS ANGELES PRIOR USE.

There is also a White Sewing Machine Company sign (defendant's Exhibit B). It is constructed substantially in accordance with an expired patent to Hotchner, namely, Patent No. 769,139, dated August 30, 1904, and has been in continuous use in Los Angeles, California, since the beginning of 1914. It differs from defendant's sign merely in the use of a wooden molding in place of a metal molding and the translucent material is a screen rather than glass. However, plaintiff's counsel ad-

mits that to substitute a metal border for a wooden molding or glass for a screen would not amount to invention:

“The COURT. Do you claim that the change from wood to some other material is invention?

Mr. GRIFFIN. Not put in that way, your Honor. What we claim is that what claim 4 of this patent discloses is a valid invention, to-wit, all of the construction mentioned in that claim. We do not claim that simply changing from wood to metal——

The COURT. Or from wire to glass.

Mr. GRIFFIN. Or from wire to glass, is an invention. It requires the entire series of elements recited in the claim to make the invention valid.” (R. 297-98.)

PRIOR ART PATENTS.

Further, we have the sign of the Little patent, No. 32,195, dated April 30, 1861, an embodiment of which is found in defendant's Exhibit BB. It differs from defendant's sign only in the fact that the front is made of wood instead of sheet metal. Also there is a French patent to Boldes, No. 335,943, dated September 17, 1903, an embodiment of which is found in defendant's Exhibit CC. It differs from defendant's sign merely in the fact that it has a glass front which, except for the part defining the letter, is intended to be made opaque in any suitable way. By covering the unused portion of the glass with a coat of paint or other shield a striking resemblance to defendant's as well as to plaintiff's sign is produced.

IMMATERIALITY OF HOTCHNER 1910 PROOFS.

Hotchner, on rebuttal, attempted to carry the date of his invention back to 1910 or some four years before he applied for his patent. Even if successful in this attempt, it would not avail him anything as against such prior uses as the Prismatic Sign and the Oregon Hotel sign, both of which are definitely proven as having been in public use for more than two years prior to the filing of Hotchner's application for patent.

Under Section 4920 R. S. the patent is invalid whenever the invention covered thereby has been in public use for more than two years prior to the filing of the application for patent regardless of the date when the alleged invention was made.

Hotchner's testimony as to what he did in 1910 is not very convincing. He claims to have constructed a letter having a raised molding, which molding differed considerably from the molding shown in the Hotchner patent. Nothing was done with this device until December 5, 1913, at which time Hotchner claims to have received an order from one Max L. Shirpser to construct a sign of a similar nature. There was no testimony offered as to the date when said Shirpser sign was constructed and erected.

The following admission made by Hotchner on cross-examination shows clearly that he is not entitled to any credit for anything he might have done in 1910 for the reason that he was lacking

in diligence, and apparently concealed or suppressed the alleged invention:

“A. The first sign I sold was the Shirpser sign.

Q. Prior to that time you had done nothing with it?

A. Prior to that time I had done nothing with it.

Q. You merely stored it away and left it?

A. That is all.” (Record p. 303.)

It is important to note that Hotchner’s testimony as to what he did in 1910 related to a sign having its border or outline molding soldered in place rather than being made integral with the sheet metal front, as by pressing or forming. Much stress was laid upon the pressed border or outline molding in the specification of the Hotchner patent, and, in his claims 1, 2 and 3, as will be seen by the following statement by defendant’s expert, Tracy W. Simpson:

“Referring to the patent specifications, the patentee says (page 1, beginning line 41):
* * * the letter construction is the important feature of the present case.

The patentee then goes on to state that this letter construction of his consists in so acting upon a sheet of metal as to press outwardly therefrom a molding ‘having an outwardly flared surface at 12, which molding will have the shape of the desired letter.’ It is thus to be seen that the letter, or the molding defining the letter or border, is produced by pressure, presumably by a metal press or die.

Continuing the patentee says (page 1, lines 51 to 57):

‘This molding is pressed outwardly far enough so that a suitable sheet of translucent material 13 may be inserted under the molding and is held in place in the plane of the sheet metal front 10 by strips of sheet metal 14, soldered or otherwise secured to the inside of the front 10.’

‘In the mechanical arts ‘pressing’ means ‘stamping’ or drawing in a flat bed machine, in which the metal is stretched into various shapes, whereas by the process of ‘forming’ we mean ‘bending’ or ‘shaping’ without necessarily producing stretching or drawing of the metal, but merely bending of same. From this view-point the Hotchner border could be produced only by ‘pressing’ in a drawing press or ‘forming’ by special tools out of the sheet metal constituting the front of the sign.”

Evidently Hotchner did not consider that he had made any invention until he arrived at the “pressed border” stage some time in 1914. Hence, the reason for his not filing an application for patent at an earlier date.

Surely, plaintiff is without grounds to argue that he has a patent of such scope as to cover defendant’s sign, and the trial Judge was correct in ruling that plaintiff’s contentions were utterly unfounded.

Re: Patent No. 1,315,187, dated September 2, 1919: (Sidewalk Illumination).

Infringement of this patent is predicated upon claims 1, 2 and 3, which, segregated into their various elements and conditions, are as follows:

Claim 1:

In an illuminated sign,

- (1) a sign body,
- (2) a lamp located within said body
 - (a) to illuminate a character carried thereby,
- (3) a lamp below the first lamp
 - (a) to illuminate the sidewalk below the sign,
- (4) and means intercepting the rays from the latter light
 - (a) when the sign is observed at some distance horizontally therefrom.

Claim 2:

In an illuminated sign,

- (1) a sign body,
- (2) a translucent character carried thereby,
- (3) a concealed light
 - (a) to illuminate said translucent character,
- (4) a reflector below the lamp
 - (a) to direct the light from said lamp through the character,
- (5) and another light upon the opposite side of said reflector from said first lamp,
 - (a) for illuminating the sidewalk below the sign.

Claim 3:

In an illuminated sign,

- (1) a sign body,
- (2) a translucent character carried thereby,
- (3) a lamp within the sign body
 - (a) to illuminate the character,
- (4) a reflector to direct the light from said lamp through the character,
- (5) and another light adjacent said reflector,
 - (a) so placed that the rays therefrom will strike the opposite side of the reflector and illuminate the sidewalk below the sign.

The meaning of claim 1 is not at all clear. It specifies a notoriously old type of sign having an upper row of lamps to illuminate the sign character and a lower row of lamps to illuminate the sidewalk and "means intercepting the rays from the latter light when the sign is observed at some distance horizontally therefrom." Any sort of a trough or reflector will intercept rays of light in the manner specified and would be a necessary adjunct where it was desired to reflect light downwardly to the sidewalk, since, naturally, it would be wasteful to have this light scattered in a horizontal direction.

Claims 2 and 3 include very clearly the use of a reflector for the lower row of lights, which reflector has a two-fold function:

(a) to reflect the light from the bottom row of lamps down on to the sidewalk, and

(b) to reflect the light from the upper row of lamps out through the sign character.

This is not a patentable combination, but is what is recognized in patent law as an *aggregation*, that is making one end or side of an article perform one function and the opposite end or side some other and decidedly different function, as in the case of the rubber tipped pencil. *Reckendorfer v. Faber*, 92 U. S. 357.

Two reflectors, each entirely separate and independent of the other, would accomplish the same result, and in effect, that is what Hotchner has, since each face of the trough constitutes a reflector which is entirely independent of the opposite face. In other words, if we take away the upper reflecting surface, we do not in any way impair the operation of the lower reflecting surface, and vice versa.

Re: Aggregation:

The law on this subject is well settled and the dividing line between combinations and aggregations is well established. Walker 5th Ed. p. 40.

The distinction between a combination and an aggregation lies in the presence or absence of mutuality of action. To constitute a combination it is essential that there should be some joint operation performed by its elements, while in an aggreg-

gation there is a mere adding together of separate contributions, each operating independently of the other. *American Chocolate Machinery Co. v. Helmsstetter*, 142 Fed. 979 (C. C. A. 2nd Cir.).

To determine on which side of the line any particular case belongs may sometimes present difficulties, but in the instant case there are so many precedents to be found in the decisions of the Supreme Court and of this court directly in point that the question is free from any doubt.

The features of defendant's device alleged to constitute an infringement of this patent comprise an interiorly lighted electric sign having means for illuminating the sidewalk and store front without destroying the effect of the sign. This is accomplished by providing an additional lamp arranged in the bottom of the sign and fitted with a trough-shaped reflector so that its light shines downwardly rather than horizontally or upwardly. The light for illuminating the interior of the sign remains unchanged and is in nowise affected by the presence of the lowermost lamps. The particular trough-shaped reflector is notoriously old, so old in fact as to call for the exercise of judicial notice. It is frequently seen in use on theatrical stages where it is arranged between the wings and drops of the stage.

A familiar example of an aggregation is that involved in the case of *Reckendorfer v. Faber*, 92 U. S. 357 pertaining to the rubber tip pencil. Millions of these articles had been made and sold

under the patent, but the Supreme Court held the patent void for aggregation, calling attention to the fact that there was no joint operation performed by the pencil and the rubber.

Another case, reported in 114 U. S. 149 involved a patent for combining a mirror with the front hood of a street-car and so locating the mirror with respect to the glass door in the front end of the car that the motorman or driver could observe all that took place on the rear platform. It was a valuable scheme and is used extensively even today in automobiles. The Supreme Court in holding the patent invalid, said:

“The elements of which the combination described in this patent is composed are all old and well known. They were a mirror, the hood of a street car over the driver’s platform, and a glass panel in the front end of the car over the door. We are of opinion that the alleged combination of these three elements, as described in this patent, is not patentable. There is, in fact, no combination, but a mere aggregation of separate devices, each of which performs the function for which, when used separately, it was adapted, and does not contribute to any new result the product of their joint use. The result attained is merely the reflection of an object in a mirror. The hood and the glass panel in the end of the car do not change in any degree the function of the mirror. It is used as a mirror only. The function of the hood is not changed by the mirror or glass panel, or both. It is a hood only on which, as in the wall of a room, the mirror is hung. The use of a glass instead of a wooden panel in the front end of the car simply removes an opaque obstacle between

the mirror and the object to be reflected by it. Neither one of the three elements of the alleged combination performs any new office or imparts any new power to the others, and, combined, they do not produce any new result or any old result more cheaply or otherwise more advantageously. There is, therefore, no patentable combination.

In the case of *Adams v. Stamping Co.*, 141 U. S. 539 the plaintiff claimed a patent for the combination of various elements with a lantern including a hinged metallic top. Similar lanterns with removable tops not hinged were known in the prior art and the court held the patent invalid for aggregation. At the trial in the lower court plaintiffs offered proof to show that the patented lantern had superseded all others and requested the trial Judge to instruct the jury that such great commercial success was strong evidence of invention and further requested the court to instruct the jury that before the patent could be held invalid it was incumbent upon the defendant to prove a prior structure or patent having all the elements of the combination combined in substantially the same manner as shown in the patent. These instructions the Judge refused to give and the Supreme Court, in sustaining the trial court, said:

“The court did not, therefore, err in refusing the instruction requested, that before the patent could be held invalid by reason of a prior patent it was not sufficient to find one of the elements in one patent, a second in another, and a third in another. If the patent were for a combination of new or old elements

producing a new result such instruction might have been correct, but as it was merely a new aggregation of old elements, in which each element performed its old function and no new result was produced by their combination, the instruction was not applicable and was properly refused.

“Nor under the circumstances did the court err in declining to instruct the jury that the fact that the Irwin lantern had practically superseded all others was strong evidence of its novelty. The question before the court upon the main issue was not of the novelty of the invention but rather of its patentable character. Where there is no invention the extent of the use is not a matter of moment.”

The rule as to aggregation and its application to the present case is also illustrated in *Grinnell Washing Machine Co. v. Johnson*, 247 U. S. 426, decided June 10, 1918, where Mr. Justice Day, after stating the rule as previously laid down in *Richards v. The Chase Elevator Co.*, 158 U. S. 299; and *Specialty Co. v. Fenton*, 174 U. S. 492, went on to say:

“Applying the rule thus authoritatively settled by this court, we think no invention is shown in assembling these old elements for the purposes declared. No new function is ‘evolved from this combination’; the new result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements.”

Re: Non-Infringement:

Disregarding the apparent illegality of this patent, and assuming, for the sake of argument, that

it is valid, it is shown by the record that defendant does not infringe, since the bottom reflector in defendant's sign does not in any way reflect light through the characters in the main body of the sign. Defendant's expert, Tracy W. Simpson, brings this out clearly in his testimony in explaining the operation of defendant's sign (Exhibit "EE").

"A. There are two reasons why no light could be reflected from the lower reflector onto the characters of the sign; the first reason is that we have been careful to provide sufficient lamps behind the characters, providing usually one at the top of the character and one at the bottom, so that the lights provide all of the illumination necessary for the character, both top and bottom. Another reason is that the lower reflector is so far down in the body of the sign, so far away from the upper portion of the sign that by no possible chance could the light be reflected backwards to illuminate the lower portion of the characters on the side."

Testifying in regard to an illustrative drawing (defendant's Exhibit FF) the witness Simpson said:

"This drawing is a correct representation to scale of the Normal Pharmacy sign. It is a section view.

Q. The red lines represent what?

A. The red lines represent rays of light coming from the centers of the filaments of the two incandescent lamps; it will be observed that these red lines are shown to impinge the lower reflector and under the well-known optical principle that the angle of incidence must always equal the angle of reflection it will be seen that there is no possible way by which

light may be reflected from the upper side back upward into the body of the sign, and in no way assist in lighting the characters on the side of the sign. Those light rays dissipate themselves on the lower crevices of the body.

A. (continuing) If one were to draw an imaginary line, he would have in the upper part an electric sign, just the same as if it had been made in Seattle under the Seattle ordinance, and in the lower part he would have a border or strip of light, which is notoriously old." (R. 259-261.)

Quite plainly, plaintiff never inspected closely nor ascertained the position of defendant's lower reflector with relation to the characters in the main body of the sign. Plaintiff tried to prove infringement by the testimony of the witness, Joseph Hotchner, who, on cross-examination, disqualified himself as follows:

"Mr. LOFTUS. Q. Did you take any measurements of those signs that are shown in this photograph, exhibit 7?

A. What measurements?

Q. The interior dimensions of the signs.

A. No, I didn't take any measurements of the interior.

* * * * *

Q. You stated that you made no measurements of the interior of these signs. Did you make any measurements of the exterior?

A. No.

Q. You don't know the height of the letters?

A. No, I do not.

Q. You don't know the depth of the trough, the bottom reflector, do you?

A. Yes, it is about 6 inches deep.

Q. Did you measure it?

A. No, I didn't. I don't have to measure a little thing like that, you can tell by your eye.

Q. You guess at it? A. Yes.

Q. And you didn't examine the interior of the sign?

A. The exterior building of the sign——

Q. Just a moment; I say, you didn't examine the interior of the sign? A. No, sir.

Q. Did you measure the distance between the bottom of the letters at each side of the sign, the bottom line of letters reading, 'Normal Pharmacy', did you measure the distance between that bottom line and the lowermost reflector which illuminates the sidewalk?

A. No, I did not." (R. 47-48.)

The well known law of physics that the angle of reflection is equal to the angle of incidence makes important the question as to just what position the bottom reflector occupies with relation to the characters in the main body of the sign in order to determine whether or not light will be reflected through said characters by the back or convex side of the bottom reflector. After failing to prove this as a part of his *prima facie* case, plaintiff's counsel sent two of his representatives to examine defendant's sign and called them to the stand on rebuttal. Even so, they failed to give exact measurements and attempted to substitute mere opinion evidence. See the depositions of witness Boylan and witness Meeks. The following shows the gist of Meek's testimony in this regard:

"Q. Since the morning session of this court, did you go over to Oakland and examine the signs testified about this morning? A. I did.

Q. Did you look inside there? A. Yes, sir.

Q. I will show you a photograph heretofore offered in evidence, carrying the words, 'Harry Rose, Haberdasher', and 'Al. Chase, Clothier', and ask you with respect to the lower line of letters reading 'Al. Chase, Clothier', whether or not, in your opinion, it is possible for light proceeding from the upper lamps to be——

A. In my opinion it does reflect." (R. 319.)

Witness Boylan's testimony is as follows:

"Q. Could any light from the interior of the signs pass against the reflectors at the bottom of the sign and through the letters 'Al. Chase, Clothier'?

A. I don't think I know what you mean. Do you mean the light from the letters that throw out onto the sidewalk?

MR. GRIFFIN. No, I mean the light from the inside of the sign proceeding down against the inside reflector here which is shown in this photograph, and then from there against the letters 'Al. Chase, Clothier'.

A. I believe it could.

THE COURT. This question is susceptible of demonstration, and should not depend on the hap-hazard testimony of witnesses. Proceed." (R. 320-21.)

As against this conjectural and opinion evidence is the positive fact testimony of Tracy W. Simpson, who, on cross-examination, testified as follows (a photograph of one of defendant's signs bearing the legend "Al. Chase, Clothier" being then under discussion):

"MR. GRIFFIN. Q. How high would you say those letters were from the bottom of the sign?

A. Approximately 7 inches.

Q. Is it not a fact that the reflector inside of the sign is more than 7 inches deep?

A. No, sir. We measured that very particularly since this came up.

Q. How deep into the sign does that reflector go?

A. I don't recall the exact figure as to the distance from the lower line of the lower line of letters to the bottom edge of the sign, and the exact distance upwards that the reflector extends into the sign, but I do recall particularly that the difference between those dimensions was from one-half to three-quarters of an inch; that is to say, the distance upward from the lower line of the lower line of letters above the edge of the sign is one-half to three-quarters of an inch higher than the vertical height of the reflector upwards into the sign.

Q. That very fact would not preclude the reflection of some light from that reflector as it might in a sign such as you have shown here, where the height above the reflector of the bottom of the letter is approximately two inches?

A. It would preclude it; there is no possible way that that light could be reflected backwards up into the sign from a reflector, when the upper line of reflector is lower than the lowest line on the characters themselves.

Q. Is it not a fact that the light would be reflected into the body of the sign, and then back to the other side, and then out to the letters on the opposite side, if there were any?

A. No, sir, not with that form of construction." (R. 289-90.)

From the foregoing it is quite obvious that even if plaintiff had a valid patent covering the use of a bottom reflector which will reflect from one set of lamps downwardly and from another set upwardly and outwardly through the main character in the body of a sign, defendant does not infringe, inas-

much as the latter function is not present in defendant's signs.

Re: Prior Art:

As the trial judge stated at the conclusion of the trial the mere mode employed to throw rays of light from a sign down to a sidewalk could not be made the subject of a patent monopoly at the time Hotchner applied for his patent. This seems so self-evident that one hesitates to refer to prior patents or prior uses showing such a thought to be old. However, the record is not lacking in this regard, as will be seen from the following quotation taken from the deposition of defendant's expert, Tracy W. Simpson:

“ ‘Various municipalities have for a long time had ordinances requiring sidewalk illumination in connection with all electric signs, and particularly signs of the interior-lighted type. This is especially true of Seattle, Washington, and Los Angeles, California, in the territory where the company of which I am Vice-President and Western District Manager operates. For instance, Ordinance No. 21308 of the City of Seattle, Washington, which has been in effect since August 8th, 1909, has at all times required that:

“ ‘Electric signs made entirely of galvanized iron, letters forms on each side of the sign, with one (1) and two (2) inch glass screw lenses, the two inch lenses with not less than a four (4) inch center, apart, and the one inch lens not less than a two (2) inch center, apart, illuminated from the inside with not less than two hundred (200) candle power to each sign, and more, if the size of the sign shall require,

bottom of sign left open to illuminate the sidewalk; will be allowed to be constructed and hung as provided for electric signs in this ordinance and as further set forth in this section.'

" 'The purpose of the requirement that the bottom of the sign be left open is to illuminate the sidewalk, and such requirement is satisfied by providing a separate set of lights to illuminate the sidewalk. In connection with such separate set of lights, it has long been the practice to provide a reflector which will direct the rays therefrom downwardly to the sidewalk.' " (R. 279-80.)

* * * * *

" 'I have examined United States patent No. 775,295 to R. W. Clark, dated November 22d, 1904, and understand the structure therein shown. It comprises a sign body A which carried at each side a sign character 4. At the bottom of the sign body there is a row of lamps 11, in connection with which there is arranged a reflector having a surface 8 to direct the light from the lamps downwardly. This reflector constitutes means for intercepting the rays from the lower lamps when the sign is observed at some distance horizontally therefrom.

" 'I have also examined United States patent No. 1,070,028 to Fortman, filed December 6th, 1912, and issued August 12th, 1913, and understand the structure shown and described therein. It is primarily intended for a signaling device, but embodies principles and structural features equally applicable to any form of illuminated sign. It comprises an illuminated sign consisting of the letter "L" and "R" (Fig. 1). These letters are illuminated by lamps contained in compartments 6 and 7. Beneath the compartments 6 and 7 there is a lamp arranged in a compartment 8 to illuminate the ground and license plate. By means of the

opaque glass front 23 and the inside partition 4 the rays from the lowermost lamp are intercepted so that the latter light will not be seen when the sign is observed at any distance horizontally therefrom.' '' (R. 281-82.)

APPELLANT'S ARGUMENT.

Appellant's brief presents two alleged points of law as a basis for asking this court to reverse the decision of the trial court. Point No. 1 has to do with the date when Hotchner claims to have made his alleged invention of the first patent in suit, to-wit, the raised molding patent. Point No. 2 complains that the decision of the trial court went beyond the matter in issue. There is a third point which appears to be interwoven with point No. 2, merely stating the same criticism in another way.

By his first point appellant's counsel apparently contends that what Hotchner claims to have done in 1910 by way of making a model eliminates in some unexplained way all of the prior patents and prior uses which defendant has offered. It is difficult to follow this argument for it fails to take into consideration the effect of the Little patent of 1861, the French patent to Boldes of 1903 and the White Sewing Machine Company sign, which is simply a physical embodiment of the expired Hotchner patent No. 769,139, dated August 30, 1904, all of which are anterior to the earliest date claimed by Hotchner.

The contention of appellant also fails to take into consideration the effect of a prior use occurring more than two years before Hotchner's filing date. It is immaterial when Hotchner made his alleged invention if it be proven that a similar device was known to others and was in public use or on sale for a period of two years prior to the filing of the application for patent in suit. Such is the status of the Oregon Hotel sign and the Prismatic sign. Great reliance is placed by appellant on the haphazard testimony of a former inspector by the name of Thorne relative to the Prismatic sign.

Under cross-examination Thorne disqualified himself when he admitted that he was familiar with but one of two signs erected by the Prismatic Sign Company for the Denver Electrical Company. It will be recalled that there were two different signs erected for the Denver Electrical Company by the Prismatic Sign Company within a comparatively short time of each other, one with flat letters and the other with a raised molding around the letters. The following is quoted from Thorne's deposition at page 317:

"MR. LOFTUS. Q. Did you know that there was more than one sign erected by the Prismatic Sign Company for the Denver Electrical Company?

A. Yes, I did.

Q. Are you familiar with both of those signs?

A. No, I am not.

Q. And you don't know from memory, now, which of these signs had the border and which did not?

A. I know that the sign that I inspected and the sign that was held up on account of permits from the Board of Public Works was all flat letters at the time it was inspected.

Q. There may have been another sign, so far as you know, that had the molding?

A. Yes, there may have been."

The second point which appellant attempts to make in his brief is that the trial court in its decision went beyond the scope of the issues. This assertion comes with bad grace in view of the repeated attempts made by the trial judge to get plaintiff's counsel to commit himself as to just what invention, if any, was supposed to be represented by each of the patents in suit. The replies of appellant's counsel were so worded as to make it clear that plaintiff's case was based upon the proposition that his first patent gave him a monopoly to the broad idea of using a raised molding around the outline of the letter, and that his second patent was such as to give him a monopoly on the broad idea of throwing light rays down from a sign whereby to illuminate a sidewalk, as will be seen by the following quotations taken from the record:

"The COURT. What is it the plaintiff claims under his patent—the exclusive right to use this?

Mr. TOWNSEND. Apparently, from the prima facie case, they claim any sort of a beveled border as an infringement.

Mr. GRIFFIN. We claim the right to use any kind of a raised metal molding.

The COURT. And you claim no one else has a right to use it?

Mr. GRIFFIN. We claim no one else has the right to use the metal molding in connection with this translucent letter with the illumination in the back of the character." (Record p. 239.)

The COURT. Do you claim a monopoly on the right to use a reflector to turn light down?

Mr. GRIFFIN. The witness says here, in connection with his affidavit, and I am only seeking to cover what is claimed by the two patents, this particular claim describes the location for the lights handling the sign, and also the lights for illuminating the sidewalk." (Record p. 337.)

If plaintiff had placed any narrower interpretation upon the scope of his patents, the matter of proving infringement would have been impossible, inasmuch as defendants' structures differ radically from the specific structures shown in the Hotchner patents in suit. The plaintiff, having based his case upon the proposition that his patents gave him a broad and comprehensive monopoly, ought not to complain that the trial court dealt with the patents on that basis.

It is submitted that on the record as made by plaintiff the trial court properly found the patents to be invalid and not infringed.

Dated, San Francisco,
October 21, 1922.

Respectfully submitted,
CHAS. E. TOWNSEND,
WILLIAM A. LOFTUS,
Attorneys for Appellees.

3861

No.

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHARLIE SING LEE,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Southern Division.*

FILED

APR 13 1922

CAPITAL NEWS PUBLISHING CO., BOISE.

F. D. MONCKTON,
CLERK.

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NAMES AND ADDRESSES OF ATTORNEYS
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*In the District Court of the United States, in and
for the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA,

vs.

CHARLIE SING LEE,

Defendant.

No. 810.

INDICTMENT.

Charge: Unlawful sale of narcotics. Violation
Act of December 17, 1914, as amended.

The Grand Jurors of the United States of America,
being first duly impaneled and sworn, within and for
the District of Idaho, Southern Division, in the name
and by the authority of the United States of America,
upon their oaths do find and present:

That heretofore, to-wit, on or about the 20th day
of December, A. D. 1921, in the City of Boise, in
Ada County, Idaho, and in the Southern Division
of the District of Idaho, Charlie Sing Lee, a Chinese
person, did then and there, wilfully, unlawfully and
feloniously *deal in* and *sell a* certain narcotic drug,
to-wit, a certain derivative or compound of cocoa
leaves, commonly known as cocaine, a more exact
description and the exact amount thereof being to
the Grand Jurors aforesaid unknown, without hav-
ing first registered with the Collector of Internal

Revenue for the District of Idaho his name or style, his place of business and the place or places where such business was to be carried on, and without having paid the special tax provided by law to be paid by all persons selling or *dispensing* cocaine as aforesaid, which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT TWO.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present:

That heretofore, to-wit, on or about the 21st day of December, A. D. 1921, in the City of Boise, in Ada County, Idaho, and in the Southern Division of the District of Idaho, Charlie Sing Lee, a Chinese person, did then and there, wilfully, unlawfully and feloniously, *deal in* and *sell* a certain narcotic drug, to-wit, a certain preparation or derivative of opium, commonly known as morphine, a more exact description and the exact amount thereof being to the Grand Jurors aforesaid unknown, without having first registered with the Collector of Internal Revenue for the District of Idaho his name or style, his place of business and the place or places where such business was to be carried on, and without having paid the special tax provided by law to be paid by all persons selling or *dispensing* such narcotic drug, which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT THREE.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present:

That heretofore, to-wit, on or about the 22nd day of December, A. D. 1922, in the City of Boise, in Ada County, Idaho, and in the Southern Division of the District of Idaho, Charlie Sing Lee, a Chinese person, did then and there, wilfully, unlawfully and feloniously deal in and sell a certain narcotic drug, to-wit, a certain preparation or derivative of opium, commonly known as morphine, a more exact description and the exact amount thereof being to the Grand Jurors aforesaid unknown, without having first registered with the Collector of Internal Revenue for the District of Idaho, his name or style, his place of business and the place or places where such business was to be carried on, and without having paid the special tax provided by law to be paid by all persons selling or dispensing such narcotic drug, which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

E. G. DAVIS,

*United States Attorney for the
District of Idaho.*

J. H. COWELL,

*Foreman of the United States
Grand Jury.*

WITNESSES EXAMINED BEFORE THE
GRAND JURY IN THE ABOVE CASE:

Harry W. Ballaine.

Endorsed: Filed Feb. 19, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

DEMURRER.

I.

Comes now the defendant in the above entitled cause and demurs to the indictment herein made and filed in the above entitled Court on the 18th day of February, 1922, for the reason and upon the grounds that the first count in said indictment does not state facts sufficient to constitute a violation of the Act of December 17, 1914, as amended.

II.

That Count 2 of said indictment does not state facts sufficient to constitute a violation of the provisions of the Act of December 17, 1914, as amended.

III.

That Count 3 of said indictment does not state facts sufficient to constitute a violation of the Act of December 17, 1914, as amended, and further that the third count of said indictment shows upon its fact that the said count is indefinite and ambiguous

in that said violation is alleged to have been committed on the 22nd day of December, 1922.

Wherefore, defendant prays that said indictment, and each and every count thereof, be dismissed, and that the said defendant be discharged.

Respectfully submitted:

P. E. CAVANEY,

Attorney for Defendant.

Residence: Boise, Idaho.

Service of the above Demurrer by copy admitted and accepted this 20th day of February, 1922.

FRED CRANE,

Asst. Dist. Attorney.

Endorsed: Filed Feb. 20, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

MOTION TO QUASH.

Comes now the defendant in the above entitled cause of action and moves the Honorable Court to quash and set aside the indictment found and filed in this Court against the said defendant on February 18, 1922, for the reason and upon the following grounds, to-wit:

I.

First: That the offense charged in Count 1 of said indictment is not stated with such degree of

certainty that the Court may pronounce judgment upon conviction according to law.

Second: That said Count 1 of said indictment alleges two separate and distinct offenses under the provisions of the Act of December 17, 1914, as amended, in that said count charges the defendant with dealing in and selling a certain narcotic drug on the date mentioned in said count, and said count 1 of said indictment is ambiguous and uncertain in that said count alleges that the defendant did then and there wilfully, unlawfully and feloniously deal in and sell a certain narcotic drug without having first registered with the Collector of Internal Revenue for the District of Idaho his name or style, his place of business and the place or places where such business was to be carried on without having paid the special tax provided by law to be paid by all persons selling or dispensing cocaine as aforesaid.

II.

First: That the offense charged in count 2 of said indictment is not stated with such degree of certainty that the Court may pronounce judgment upon conviction according to law.

Second: That said count 2 of said indictment alleges two separate and distinct offenses under the provisions of the Act of December 17, 1914, as amended, in that said count charges the defendant with dealing in and selling a certain narcotic drug

on the date mentioned in said count, and said count 2 of said indictment is ambiguous and uncertain in that said count alleges that the defendant did then and there wilfully, unlawfully, and feloniously deal in and sell a certain narcotic drug without having first registered with the Collector of Internal Revenue for the District of Idaho his name or style, his place of business and the place or places where such business was to be carried on without having paid the special tax provided by law to be paid by all persons selling or dispensing cocaine as aforesaid.

III.

First: That the offense charged in count 3 of said indictment is not stated with such degree of certainty that the Court may pronounce judgment upon conviction according to law.

Second: That said count 3 of said indictment alleges two separate and distinct offenses under the provisions of the Act of December 17, 1914, as amended, in that said count charges the defendant with dealing in and selling a certain narcotic drug on the date mentioned in said count, and said count 3 of said indictment is ambiguous and uncertain in that said count alleges that the defendant did then and there wilfully, unlawfully and feloniously deal in and sell a certain narcotic drug without having first registered with the Collector of Internal Revenue for the District of Idaho his name or style, his place of business and the place or places

where such business was to be carried on without having paid the special tax provided by law to be paid by all persons selling or dispensing cocaine as aforesaid.

Third: That said count 3 is ambiguous and uncertain in that said offense is alleged to have been committed on the 22nd day of December, 1922.

Said indictment is further defective in that count 1 is an independent and separate offense alleged to have been committed by the defendant on a separate and distinct date from the dates alleged in count 2 of said indictment and count 3 of said indictment. That there are three separate and distinct offenses alleged in the respective counts of said indictment on three separate and distinct dates which are not of such a nature as may be properly joined in the said indictment.

P. E. CAVANEY,
Attorney for Defendant.
Residence: Boise, Idaho.

Service accepted February 20, 1922.

FRED CRANE,
Asst. Dist. Attorney.

Endorsed: Filed Feb. 20, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

MOTION TO ELECT.

Comes now the defendant in the above entitled cause and moves the Court that plaintiff be required to elect upon which one of the counts the prosecution will rely in the indictment found against the above named defendant and filed in the above entitled court on the 18th day of February, 1922.

P. E. CAVANEY,
Attorney for Defendant.
Residence: Boise, Idaho.

Endorsed: Filed Feb. 21, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

JOURNAL ENTRIES.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Tuesday the 21st day of February, 1922, and other dates as stated, the following proceedings, among others, were had, to-wit:

Present:

Hon. Frank S. Dietrich, Judge.

United States of America,

vs.

Charle Sing Lee,

Defendant.

CRIMINAL NO. 810.

Defendant's demurrer to and Motion to quash the indictment were argued before the Court by the District Attorney and P. E. Cavaney, Esq., counsel for the defendant. Whereupon the Court sustained the demurrer and motion as to the third count and overruled as to the other counts of the indictment.

The defendant then waived the reading of the indictment and was furnished with a true copy thereof. The Court asked the defendant if the name by which he was indicted was his true name, and the defendant replied in the affirmative.

The Court asked the defendant if he pleads guilty or not guilty of the offense charged in the indictment, and the defendant pleaded not guilty.

The cause was set for trial at ten o'clock February 22, 1922.

Wednesday, February 22, 1922.

This cause came regularly on for trial before the Court and a jury, the defendant being present with his counsel, P. E. Cavaney, Esq., the Government being represented by E. G. Davis, District Attorney. The clerk, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury.

W. E. Graham, R. D. See and Oscar Hanson whose names were so drawn on voir dire, examined and passed for cause, and excused by the Court on peremptory challenge. Following are the names of the persons whose names were drawn from the jury box, who were sworn on voir dire, examined and accepted by counsel for the respective parties, and who were sworn to well and truly try said cause and a true verdict render, to-wit: Edward L. Hass, J. E. Alderson, Harve Douglass, Wm. H. Thompson, W. S. Decker, George Bennett, Wm. Stark, A. K. Baker, Nick Wilson, Martin Stien, Henry McGuire and A. C. Thompson. The indictment was read to the jury by the District Attorney, who informed them of the defendant's plea entered thereto.

Here J. M. Adams, H. W. Ballaine, and H. W. Cole were sworn and examined as witnesses and other evidence was introduced on the part of the United States and here the plaintiff rests.

The defendant here moves the Court to instruct the jury to return a verdict for the defendant, which motion was denied by the Court.

Harry Fong, Fong Ping, Fong King and Wm. L. Jones were sworn and examined as witnesses on the part of the defendant, and here the defendant rests.

On rebuttal E. S. McDermott was sworn and examined as a witness on the part of the Government, and here both sides close.

The defendant here renews his motion for an instructed verdict in favor of the defendant, which motion was denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, then placed them in charge of A. J. Robinson, a bailiff duly sworn, and they retired to consider of their verdict.

On the same day the jury returned into Court and the defendant and counsel being present. The Court asked the jury if they had agreed upon a verdict, and they, through their foreman, replied that they had, and thereupon presented their written verdict which was in the words following, to-wit:

“IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF IDAHO,
SOUTHERN DIVISION, FEBRUARY
TERM, 1922.

United States of America,

vs.

Charlie Sing Lee,

Defendant.

VERDICT,

We, the jury in the above entitled cause, find the defendant guilty as charged in the first count, and we find the defendant guilty as charged in the second count of the indictment.

J. E. ALDERSON,

Foreman.”

The verdict was recorded in the presence of the jury, then read to them and they each confirmed the same.

The jury was discharged, and ten o'clock A. M. February 28th, 1922, fixed as time for pronouncing judgment. Thirty days were allowed for preparing and filing a bill of exceptions.

Saturday, March 4, 1922.

Ten o'clock A. M. March 8, 1922, was fixed as time for pronouncing judgment herein.

Wednesday, March 8th, 1922.

Comes now the District Attorney with the defendant and his counsel into Court, this being the time fixed for pronouncing judgment herein.

The Court asked the defendant if he had any legal cause to show why judgment should not be pronounced against him, and the defendant having none, and no sufficient cause appearing to the Court, it was announced to be the judgment of this Court that the defendant pay a fine of \$500.00 and be confined in the County Jail of Ada County, Idaho, for a term of ten months on the first count; and pay a fine of \$500.00 and be confined in said jail for a term of ten months on the second count of the indictment. The terms of imprisonment on the two counts to run concurrently.

Upon application of defendant's counsel, it was ordered that the execution of this judgment be stayed, pending the defendant's appeal on Writ of

Error, and that the defendant be released upon a cash bond in the sum of \$2500.00 pending the judgment on said appeal.

(Title of Court and Cause).

BILL OF EXCEPTIONS.

The defendant herein, Charlie Sing Lee, was indicted by the Grand Jury for the violation of the Act of December 17, 1914, as amended, upon two counts, to-wit:

For dealing in and selling cocaine on the 20th day of December, 1921, and for dealing in and selling morphine on the 21st day of December, 1921, at Boise, Idaho.

A trial by a jury was had on the 22nd day of Februry, 1922, and the defendant was found guilty as charged, whereupon on the 8th day of March, 1922, the Court sentenced the said defendant to imprisonment in the County Jail of Ada County, Idaho, for ten months on each count, the sentence to run concurrently, and to pay a fine of \$500.00 on each count.

Thereupon the defendant filed a petition for a writ of error to the United States Circuit Court of Appeals on the 8th day of March, 1922, and on the 9th day of March, 1922, the writ of error duly issued thereon and citation was duly made and filed.

The defendant herewith presents the following proceedings had upon the said trial and the evidence introduced and the exceptions taken thereto and allowed by the Court, all of which defendant claims and says was manifest error which was committed to his injury, to-wit:

James Hill, a witness on behalf of the Government testified as follows:

Witness resided at Salt Lake City, Utah, for twenty years. Came to Boise, Idaho, on the 18th day of December, 1921, from Pocatello, Idaho. Witness did not know defendant. Saw defendant for the first time on the 20th day of December, 1921, in a China store between Grove and Front on Seventh Street, Boise, Idaho. Had a conversation with the defendant. Told defendant that he, Hill, wanted to buy "Junk" "Cocaine" and he told me to come back. There were two policemen walking up the street now so I went back at nine o'clock that evening and saw the defendant in the store and asked him if I could get some cocaine. He said yes.

Q. Did he sell you any cocaine at that time?

MR. CAVANEY: Just a minute. That is leading and suggestive, if Your Honor please.

THE COURT: Overruled.

MR. CAVANEY: Note an exception.

A. Yes, sir.

THE COURT: What did you say?

A. I told him I wanted to get two and a half's worth of cocaine.

MR. DAVIS: Two and a half dollars worth?

A. I gave him the money and he went into a rear room out of the store and slipped me a package and the next morning at nine o'clock I delivered the package to Cole and Ballaine in the United States Attorney's office, who kept it ever since.

No one else saw the defendant deliver the cocaine to me. Cole gave me money to make the purchase. I saw the defendant the next time on December 21st, at three o'clock in the afternoon at the same place. I went down there to get morphine. I told the defendant I wanted to get a \$1.00 package of morphine and he went in the rear room and came out with the package and gave it to me. He delivered the same as the delivery of the cocaine was made. I delivered the morphine to Ballaine in the lavatory of the pool room on the corner of Seventh and Main streets about five minutes after I made the purchase.

Q. Did you see the defendant at any other time on the day immediately following these two days?

A. I did, yes, sir.

Q. Did you attempt to make a buy from him at that time?

MR. CAVANEY: Just a moment. We object as incompetent, irrelevant and immaterial. It doesn't tend to prove or disprove any of the allega-

tions in the information, as to what he may have done subsequent to the dates of the alleged charge in the information.

THE COURT: Unless there is some reason that I do not appreciate now, Mr. District Attorney, I think at this juncture I shall have to sustain the objection.

MR. DAVIS: That and other testimony will be offered, if Your Honor please, on the theory that that evidence is competent for the purpose of proving continuous conduct, proving the intent and the knowledge and the motive with which these sales were made; for proving also that he was, as charged in the indictment, a dealer in these drugs. There are several theories on which the evidence is entirely competent.

THE COURT: Well, perhaps on the last ground—not on either of the others, because there is no question here of intent, at the present time at least. If the act was done, as the witness testified, there couldn't be any question about the intent, under the present status of the testimony, and a continuing offense, I couldn't admit it on that ground. Let me see the form of your allegation here as to dealing. (Reading indictment). What have you to say as to that, Mr. Cavaney?

MR. CAVANEY: If Your Honor please, I filed a motion to quash and a demurrer to this indictment, upon the ground and for the reason that

there was a duplicity in the pleading, in that they were charging this man with being a dealer in and also selling morphine. And at this time we desire to interpose an objection to any testimony offered by the prosecution in this case upon the allegation in the complaint or in the indictment that this plaintiff was dealer in narcotic drugs, and for the further reason that evidence of any other subsequent offense would not be admissible upon any theory in this action, because we are compelled to meet the allegations and the indictment as charged here upon two counts, and the proof and our defense would necessarily be confined to meet the proof, or to meet the charge in those two counts. And it is uniformly held by the Federal Courts that proof of other offenses is not admissible in actions of this kind to prove character or motive or for any other reason. If the Court desires me to cite the Court authorities on that point I will be glad to do so.

THE COURT: No. I have already ruled in your favor upon that point.

MR. CAVANEY: We will ask to have all testimony stricken in regard to any other sale or any other conversation affecting any sale, or for the purpose of consummating a sale subsequent to the last date charged in the information, to-wit, the 21st day of December, 1921.

THE COURT: I think I shall have to overrule the objection.

MR. CAVANEY: Note an exception.

MR. CAVANEY: As I understand the ruling of the Court, you will permit testimony of any offense subsequent to the dates alleged in the information?

THE COURT: Oh, we have not gone so far yet. This was on the following day. It will be somewhat within the discretion of the Court as to just how far off in time acts may be shown, but this is on the following day, and the charge is that on or about these two days defendant was selling and dealing in.

MR. DAVIS: Q. Did you, on the 22nd day of December, 1921, that is, the day immediately following the day on which you made your second purchase, attempt to make a third purchase from Charlie Sing Lee?

A. I did.

MR. CAVANEY: If Your Honor please, in order to save our record on that, we will object as incompetent, irrelevant, and immaterial, and evidence adduced of, or attempted to be adduced of, a sale subsequent to the time charged or alleged in the information.

THE COURT: The objection is overruled. You may have your exception, and it may be understood that your objection goes to all of these questions as to this particular sale, and that they are overruled, and that you have exceptions to them.

MR. DAVIS: Answer the question, Mr. Hill.

A. I did.

CROSS EXAMINATION.

Occupation a general cook. Was doing nothing before I came to Idaho from Salt Lake. Was an addict for 25 years. Used both cocaine and morphine hypodermically. Was sent from Boise, Idaho, to Blackfoot for the cure December 28, 1921. Was in Boise for ten days before I went there. Did not follow any vocation in Boise. Bought morphine and cocaine in Boise pretty often. Bought it for my own use. Have been cured of the use of drugs for about six weeks. I was cured once before. I was off for four years and the doctor put me back on it for asthma and I have been on it ever since. I met Ballaine through Cole and Cole through Watts. I have known Watts, Narcotic Inspector, all my life. I was engaged by the Chief of Police at Salt Lake to work for Watts; then with Cole; then with Ballaine. Worked with Watts. I came here for Cole on December 18, 1921, from Pocatello, Idaho, where I put in one day and night. Got my expenses from Cole in Pocatello to come to Boise, Idaho. I don't know how much money I got for expenses. Got more money from Cole in Boise. I don't know the number of the house where I purchased the cocaine and morphine from the defendant. Hary Fong is the manager of the place. I went down to Harry Fong's place to get drugs. Was told before I came to Boise that Cole and Ballaine were trying to get the defendant for two years. I consented to act

for them. There was a couple of Chinamen in there when I bought. Harry Fong was not there. There was a little old Chinaman running the store. Witness marked Exhibit "A" "J. T. H." Did not turn exhibit over to Cole and Ballaine until nine o'clock the day after the purchase and never informed Cole or Ballaine that witness had made the purchase before the time of the delivery. Witness did not taste the contents of the package but can tell morphine and cocaine by its looks. Don't know who was in Harry Fong's store at the time of the purchase. I got the money from Ballaine. Ballaine sent me to Blackfoot to be cured. Cole and Ballaine both knew that I was using cocaine and morphine before I came to Boise.

HARRY W. BALLAINE, witness for the Government.

Is a Federal Narcotic Inspector for the district of which Idaho is a part. Was in Boise about the 20th of December, 1921. Witness Hill was working for me in Boise. I and Cole sent Witness Hill to made purchase of morphine from the defendant. Witness and Cole gave Hill \$2.50 in money to go down and buy from the defendant. We told the witness Hill to bring back the purchase the next morning to the United States Attorney's office. He brought it back and the package was marked "Exhibit A." Package was marked "Bought from Charlie Sing Lee on 12-20-21 H. W. B.-H. W. C.-

J. T. H., 9 A. M.” Witness is a graduate from the school of pharmacy of the Pullman Agricultural College of Washington in 1912. In actual practice of pharmacy for nine years. Exhibit A contained cocaine. Made arrangements with Hill next day to buy a bindle of morphine. Gave witness \$1.00 and told him to go to the same place and purchase from the defendant. Witness brought package back, “Exhibit B,” and gave it to me in the pool room on Seventh and Main streets. Package marked “12-21-21 H. W. B.-J. T. H.” Marks were put on in the afternoon some time in the United States Attorney’s office. Witness says package contains morphine.

MR. DAVIS: We offer Exhibit B in evidence.

MR. CAVANEY: We object as incompetent, irrelevant and immaterial. It has not been shown by this witness that this is the same package that was procured from the defendant at that time and place.

THE COURT: Overruled.

MR. CAVANEY: Note an exception.

MR. DAVIS: Q. Did you make any further arrangements with Mr. Hill for the purchase of narcotics from this defendant at or about that time?

MR. CAVANEY: On that date, or what?

MR. DAVIS: Either of those dates, or the date immediately following.

MR. CAVANEY: We will object to any testimony of any sales or anything else on a date subsequent to the finding in the indictment, for the reasons heretofore interposed in objecting to the testimony of the former witness.

MR. DAVIS: I understand you have a general objection.

MR. CAVANEY: I did as to that witness.

THE COURT: The objection is overruled.

MR. CAVANEY: Note an exception.

A. Yes; I gave him money and told him to buy from him any time he could, the rest of that day, but he was unable to procure any more.

MR. DAVIS: Q. And did he bring you any further narcotics which he stated he had bought from Charlie Sing Lee?

A. He did not.

Q. On the 22nd day of December, 1921, Mr. Balaïne, did you see Charlie Sing Lee at any time?

MR. CAVANEY: If Your Honor please, we object as incompetent, irrelevant and immaterial, subsequent to the times charged in this indictment; and of course, I don't know the purpose for which this is attempted to be proved, but I cannot understand why a subsequent offense or sale or attempted sale would have any bearing on this particular transaction.

THE COURT: You may be borrowing trouble, Mr. Cavaney. He just asked him whether he saw him. The objection is overruled.

A. I saw him.

MR. DAVIS: Q. On what day, Mr. Ballaine?

A. The 22nd day of December.

Q. Did you make a purchase of narcotics of the defendant on that day?

MR. CAVANEY: If Your Honor please, we desire to object as incompetent, irrelevant and immaterial, and not the date as charged in the information, subsequent to the time.

THE COURT: Overruled.

MR. CAVANEY: Note an exception.

A. I did.

MR. DAVIS: Q. You may state the circumstances under which the purchase was made. When did you make the purchase?

A. At six-fifteen on the evening of December 22nd, 1921.

Q. And where did you make it?

A. At a Chinese store; I think they know it as Fong's store, and I believe the number is 211 South Seventh street.

Q. Is that the store near the alley between Front and Grove?

A. It is on the alley between Front and Grove, on Seventh.

THE COURT: Gentlemen of the jury, the charges in this case are selling and dealing in these drugs on the 20th and 21st of December, 1921. If you convict the defendant at all it will have to be

upon the assumption that he was **dealing in** and selling the drugs upon those two dates, one of those two dates. I am going to permit this testimony to go before you as possibly throwing some light upon the question whether or not he was dealing in and selling drugs upon the 20th and 21st. You can't find him guilty under this indictment merely because he may have sold on the 22nd, if he did sell, but you may consider a sale, if you find a sale was made, on the 22nd, as a circumstance bearing upon the question or the issue raised by the indictment as to whether or not he was selling and dealing on the two preceding days.

MR. DAVIS: Now you may answer the question. Proceed with your answer.

WITNESS: I don't know what it was.

Q. All right. I will ask another question. You may describe the circumstances under which this sale was made, narrating what was said by you to Charlie Sing Lee, and what was said by him to you, and what passed between you, if anything.

A. I went to this Chinese store at five-thirty December 22nd, 1921, and there were several Chinamen in the store, and I asked if Charlie Sing Lee was there, and they told me no. I asked when he would be back, and they said maybe an hour. I retired and went back again to the store at six-fifteen. The defendant was lying on a bench or a table just to the left of the door, as I entered. I

had never seen him and didn't know him. I asked him if Charlie had come back, and he said 'Yes—what do you want?' I says, "I want to see Charlie Sing Lee." "Well, all right," he says. I says, "Are you Charlie Sing Lee?" "Yes." I says, "I want to buy some M."

THE COURT: Buy some what?

A. "M". That is commonly used by addicts, meaning morphine. He says, "I haven't got very much." I will change that. He says, "I haven't got any, but I can sometimes get it for friends." Well, I says, "I don't want very much. How do you sell it?" He says, "A dollar a bindle." "Well," I says, "that will be enough for me tonight." He says, "All right; give me your dollar." I gave him the dollar. And he says, "Now, go out and go down to the corner and stall around until I come. These boys don't like to have you in here." I went down to the corner, and as I turned around I seen Charlie coming out of the store building. I looked over to my right and there were two or three men coming along the sidewalk. So I stayed on the corner until they had passed. Charlie sauntered slowly down towards me and stepped up into the doorway until these parties or men that I have spoken of all passed. Then I walked towards him, and he towards me, and he handed me the bindle of morphine. I turned around and says "Charlie, I expect some money for Christmas and would like to

buy it in a little larger quantities. How much can I get an eighth for?" He says, "You can buy a dram for seventeen bucks." I says, "That is too much; I can only pay fifteen. See you tomorrow." That was all.

Q. Have you this morphine with you that you say you purchased?

MR. CAVANEY: Just a minute. In order that I might save the record on this, I move at this time to strike from the record all of the testimony of this witness relative to a sale on the 22nd day of December, 1921, to this witness, for the reason and upon the ground that it is incompetent, irrelevant and immaterial, and an offense separate and distinct from the offense charged in the indictment.

THE COURT: The motion is denied. You may have exception.

MR. DAVIS: I was asking you if you had the morphine that you purchased from Charlie Sing Lee?

A. I have it.

Q. May I see it?

A. (Handing package to District Attorney)
Yes.

MR. DAVIS: Can you mark that some way?

Said package was marked

PLAINTIFF'S EXHIBIT "C".

Q. Showing you Plaintiff's Exhibit C, for identification, I will ask you to state what marks, if

any, are on that package, and when they were placed there.

A. 12-22-21, one dollar, Charlie Sing Lee, H. W. B. They were placed there at room 116 Owyhee Hotel, between six-thirty and seven o'clock December 12th, 1921.

Q. What date?

A. December 22, 1921.

Q. Are the contents of this package the same as at the time you purchased it from Charlie Sing Lee?

A. They are.

Q. And have you examined the contents?

A. I have.

Q. What are they?

A. Morphine.

MR. DAVIS: I will offer this in evidence.

THE COURT: Is that what is known as a bindle of morphine?

A. Yes, sir; that is a bindle.

MR. CAVANEY: We would like to interpose the same objection to this testimony that we have interposed to the testimony heretofore.

THE COURT: The same ruling. You may have an exception.

MR. DAVIS: Q. At the time you made this purchase, Mr. Ballaine, were you dressed as you are now?

A. No, sir.

Q. How were you dressed on that occasion?

A. Why, I had on an old coat and an old vest, and a dark soft-collared shirt, without a tie, and black slouchy cap, and a pair of old shoes.

Q. Did you attempt to make any other purchases from Charlie Sing Lee?

A. I did.

Q. On or about the 21st, 22nd, or 23rd, along about there?

A. The 23rd, I did.

Q. With what success?

A. No success whatever.

It was arranged by Cole, Ballaine and Hill in Pocatello that Hill was to come and make a purchase from the defendant. Cole and Ballaine were using Hill for the purpose of procuring evidence of the sale of narcotics and were furnishing him with money and means to do so. Witness Ballaine instructed Witness Hill to go out and scout around Boise and try to make purchases of narcotics. Witness Ballaine had on a pair of trousers that he had worn around the store for some time; an old pair of shoes, a dark colored coat and vest he had worn in the store; an old slouch cap. Put these clothes on for the purpose of disguising himself so that he would not be suspected of being a narcotic inspector and hunting out men for violation of the act. Kept the costume on until the evening of the 26th of December except when witness got through work and went to dinner, would then change clothes. Wit-

ness Ballaine was not present when Hill made the purchases from the defendant.

Q. You are familiar with the effects of morphine and cocaine upon a person's general character or habits and character, aren't you?

A. I think so.

Q. What effect, if any, does the use of morphine or cocaine have upon a person?

THE COURT: This, of course, is not cross examination.

MR. DAVIS: We object as not proper cross examination.

THE COURT: You will be bound by his answers if you make him your witness.

MR. CAVANEY: I understand that we will be bound, but I think there is another purpose that we desire to bring out by this witness.

THE COURT: Well, you are making him an expert now. He hasn't testified as an expert.

MR. CAVANEY: I believe he did. He qualified that he was a man competent—

THE COURT: He qualified to the extent of his ability to know morphine and cocaine.

MR. CAVANEY: Yes.

THE COURT: But not as to the effects of the use of morphine or cocaine upon a human being. At least I don't recall any evidence at all that he gave upon that point. He qualified as a pharmacist and stated that he knew what cocaine is, and morphine.

MR. CAVANEY: Of course, I believe that ordinarily a pharmacist would be able to tell the effects generally, what morphine or cocaine might have on a person, and we desire—

THE COURT: He didn't testify upon that point. If there is no objection, you may make him your own witness, but, as I say, you will be bound by his testimony. But I will not permit you to rebut his testimony.

MR. CAVANEY: Well, note an exception.

THE COURT: So that there may be no misunderstanding, I simply sustain the objection then that this isn't cross examination, and you may have an exception to that.

MR. CAVANEY: Yes.

Witness Ballaine was not present at any time either purchase was made by Hill from the defendant.

Q. You are relying absolutely on the statement of Mr. Hill in regard to whether or not he had made the purchase?

THE COURT: No, that isn't—

MR. DAVIS: I object to it as incompetent, irrelevant, and immaterial.

THE COURT: I can't see that that is material. You can argue that.

MR. CAVANEY: Note an exception.

MR. DAVIS: The Government rests.

MR. CAVANEY: At this time we desire that the record may show that we move the Court at this time—

THE COURT: I think before the Government rests, Mr. District Attorney, you should offer to prove why it was—it may not be very material—but why it was that this man, Mr. Hill, was sent to this place, as bearing upon the question of the defense which is being made in some of these cases,—that the sale was induced by the Government.

MR. DAVIS: Well, I thought I would make that in rebuttal, if that defense should be made.

THE COURT: No. I think you would better make it now.

MR. DAVIS: Did you say why he was sent here?

THE COURT: No. Why he was sent to this place to get the evidence, if he was sent there. Some statement has been made that he was employed to get the evidence against the defendant.

MR. DAVIS: Yes, we will bring that out. Call Mr. Cole.

HAROLD W. COLE, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I was known to most of the Chinese in Boise and for that reason there were some cases I could not make. Hence I asked Mr. Watts, Narcotic Agent

at Salt Lake, to send me a stranger whom I could use and he sent me Hill.

MR. DAVIS: Q. Was there anything unusual about an arrangement of that kind? (Referring to the arrangement with Witness Hill) in the manner of obtaining evidence against dealers in narcotic drugs?

MR. CAVANEY: We will object to that, if Your Honor please, as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. CAVANEY: Note an exception.

A. No, sir; nothing unusual.

Q. Now, were any instructions given to Mr. Hill about the manner in which he should approach these parties from whom he was to purchase?

A. No particular instructions. I had been told by Mr. Watts that he knew the methods necessary to get evidence, and I talked with him in regard to some of his experience, and I knew that Hill knew the methods, and simply told him that Charlie Sing Lee had been—I guess I can't say—it had been my information, and so forth, that Charlie Sing Lee—

THE COURT: Yes, this is the point.

MR. DAVIS: Yes, you can say that.

THE COURT: I will say, Mr. Cavaney, this same question has arisen before, and I assume from the course of some of your examination of witnesses that you intend to make the contention which is be-

ing made more or less frequently, that the Government cannot prosecute a case where its agents have gone out and gotten the contraband stuff from the defendant. Now, if that contention is to be made in this case I shall permit the witness to go far enough to show the fact, if it be a fact, that they suspected, that is, the Government agents suspected this defendant of being engaged in the business of selling these drugs, and that it was for that reason that they sought to secure this evidence. Now as to just how far he should be permitted to go will depend somewhat upon your own disposition or attitude in the matter. I shall permit him to go at least that far, if you are going to make that contention, upon the theory that there is a distinction between a case where the Government sends someone to buy liquor or buy narcotics from one who is not suspected of violating the law and sending him to another person against who there are reasons to believe is violating the law.

MR. CAVANEY: Well, if Your Honor please, the only objection I see to that is this, that so far as anybody may know we would never know what they might think themselves or whether they might suspect anybody, as to whether or not they would suspect any ordinary person of the commission of a crime, and the evidence is entirely within their own knowledge, and we have no way of finding out on cross examining or anything else; we would not be

permitted, in other words, to go into an elaborate cross examination to ascertain the reasons and the facts why they had these suspicions.

THE COURT: Yes; I will permit you to go into that on cross examination. I say it is for you to determine, whether you want to go into that upon cross examination or not. I wouldn't permit the witness at the outset to go into these facts and circumstances because they might be prejudicial; but if you can feel that the statement is not well founded, that the government agent did have reason to believe the defendant was engaged in this business, you may cross examine him.

MR. CAVANEY: Well, of course, as I understand the ruling in those cases—I might be in error—as I understand the ruling in the cases which have been decided and upheld in the federal courts, it is that the Government is not permitted either—whether it be that they have information of a person having been guilty of a crime, that they will be permitted to entice, induce or entrap any person into the commission of an offense, the theory being this, that it is not the Governments policy to be a party to the commission of an offense, and that the cases so hold, that where the offense has been committed—

THE COURT: I dont care to hear a discussion of that general question at the present time; I hear it so frequently. I will hear you briefly upon it at the proper time. But I have heard a full dis-

cussion of it in the last two or three days, and I have heard several discussions of it just recently in Phoenix, and wherever I go, so that I wouldnt want to take very much time discussing a question, concerning which I should be familiar. I will hear you briefly upon that general question later on, if you desire to be heard. But as I say, I am going to permit the witness,—I asked the District Attorney to produce him for this one purpose, in order that I may rule intelligently upon the motion which I anticipate you will make. And if it turns out from the undisputed testimony that the Government did entice an innocent man into violating the law I will take the case away from the jury; but if the evidence is doubtful upon it I will submit it to the jury, with instructions.

MR. CAVANEY: Well, of course—

THE COURT: I will hear you upon the general question later on.

MR. CAVANEY: Well, I will save my record on this matter as we proceed.

THE COURT: Yes,—You may proceed.

MR. DAVIS: Q. I will ask you, Mr. Cole, whether or not you had any reason to believe, and, if so, what that reason was, that the defendant was engaged in the sale of narcotic drugs?

MR. CAVANEY: We object to that as incompetent, irrelevant and immaterial.

THE COURT: You had better divide your question.

MR. DAVIS: Q. I will ask you whether or not you had reason to believe that the defendant was engaged in the sale of narcotics?

A. I had reason so to believe.

MR. CAVANEY: I will ask to have it stricken out.

THE COURT: You may make your objection now.

MR. CAVANEY: We object as incompetent, irrelevant, and immaterial, and move that the answer of the witness be stricken out, for the reason and upon the grounds that this evidence would be inadmissible to show the commission of any other offense or the suspicion of any other offense than the offense charged, for which we are charged in the indictment and for which we are called to meet, and that there is no other date other than the specific dates mentioned in the indictment upon which there is an alleged sale that has been made by this defendant.

THE COURT: Overruled.

MR. CAVANEY: Note an exception.

A. I had reason to believe that he was a drug dealer.

MR. DAVIS: What were your reasons for so believing, Mr. Cole?

MR. CAVANEY: We will object to that for the same reasons.

MR. DAVIS: Q. What information had you that he was a dealer?

MR. CAVANEY: We will object to that on the same grounds and for the same reasons.

THE COURT: I think I shall sustain the objection. I think I will ask you two or three questions myself. You may object to them, Mr. Cavaney, just the same as if counsel asked them.

How long had you been operating in this territory as such special agent, Mr. Cole?

A. About a year and nine months.

Q. (By the Court). Did you know the defendant yourself?

A. Yes, sir; I have known him for practically that length of time.

Q. And had you been here frequently or infrequently?

A. Oh, an average of once a month for three or four days or a week, or sometimes ten days.

Q. I assume that the reasons of which you speak are based upon information that came to you from different sources?

A. Conversations with addicts and personal observation.

Q. And it was because of that information or that belief that you employed the witness here?

A. Yes, sir.

Q. Who had been an addict?

A. Yes, sir.

Q. For the purpose of procuring evidence of sale?

A. Yes, sir; evidence.

THE COURT: I think that is as far as I will permit you to go.

MR. CAVANEY: With the understanding of the Court that my objection goes to all of this questioning?

THE COURT: Yes. Your objection may be understood as going to each one of these questions, and as being overruled, and you may have an exception.

MR. CAVANEY: Yes, And I move to strike each and all of the answers to the respective questions.

THE COURT: The motion is denied.

MR. CAVANEY: An exception.

THE COURT: You may have your exception. Unless you are going to cross examine him on the point, I will instruct the jury now, to guard against prejudice to the defendant from this testimony, and state to them the purpose for which it is admitted and the only purpose. If you prefer, I will do that now, or after your cross examination .

MR. CAVANEY: That will be all right. I am not going to cross examine him.

THE COURT: Gentlemen, I will say to you, perhaps further in explanation of what I have already said in your presence, concerning the evidence just given by this witness as to certain reports and rumors which may have come to him inducing him to

believe that the defendant was engaged in the illicit sale of these drugs: You cannot consider those rumors or statements or the witness belief as any evidence at all that the defendant here is guilty of these charges, or that he was in fact engaged in violating the law, or did in fact violate the law. The only purpose for which you can consider this evidence, and the only purpose for which I have received it, is to throw some light upon the circumstances under which the Witness Hill was employed, this former addict, to go to this place, for the purpose of getting evidence. It bears only upon the imputation or charge that the Government was seeking to and did induce an innocent man to violate the law. I will explain more fully the principle by which you are to be governed in passing upon this evidence later on. It is enough to say now that you are not to consider it as evidence of the defendant's guilt.

MR. CAVANEY: Now, if Your Honor please, may the record show that the Government having rested their case, the defendant at this time moves the Court to instruct the jury that there is no evidence, competent evidence, before them, for their consideration, covering the charges in this indictment, to-wit, of having sold or dealt in or sold narcotics, to-wit, cocaine or morphine, on the respective dates alleged in the information, and to instruct the jury to find the defendant not guilty, for the

further reason and upon the grounds that the evidence shows in this case that the person who procured the evidence was employed and procured by Mr. Cole and Mr. Ballaine, the narcotic inspectors, who had the matter in charge of investigating the violations of the narcotic act in the state of Idaho and elsewhere, and that all of the evidence which has been procured in this case, so far as it affects the indictment herein, were procured by and with the consent of Mr. Cole and Mr. Ballaine through the use of an addict, Mr. James Hill, and that that addict was employed by the said Cole and Ballaine for the purpose of procuring evidence and for the purpose of inducing, enticing and persuading the defendant in this action or any other person to sell or give or otherwise dispose of narcotics or morphine or other drugs, and then after such procurement or sale had been made, that the said party that had made the sale was to be arrested, and was in fact arrested by the Government of the United States, charged with the offense—was charged with the identical offense which the Government had procured the defendant to commit. In other words, that the defendant in this action having been induced and persuaded by the agent of the Government of the United States to purchase the said cocaine and morphine, as charged in the counts one and two of said indictment, and then, after the purchase of the same was made, an arrest has been

made of this defendant, and he is now here defending the said charge. And that the evidence conclusively shows that there was no valid or good reasons why the Government should have resorted to any extraordinary methods, or why they resorted to this method, in order to procure evidence against this particular defendant. And that evidence of this nature having been procured in the manner in which it was procured, should not stand.

THE COURT: The motion is denied.

MR. CAVANEY: Note an exception.

HARRY FONG, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Resides in Boise, Idaho. Has known the defendant three or four years. Is acquainted with Cole, narcotic inspector. Never met Ballaine but know him when I see him. Is not acquainted with the witness Hill. Never saw Hill before I saw him in the court room. Hill was not in his store on the 20th and 21st of December, 1921. Witness was there all day of these dates. Never saw Hill at any time in my store. Did not see Ballaine in my store on December 22, 1921. Was there all day on that date. Runs his place personally. If I am not there Fong King runs my store. I was running my business all day and evening of the 22nd day of December, 1921. There were no white men in my store on that day. There were no white men in my store

during the week of December 20, 21 and 22, 1921. Charlie Sing Lee was in my place on the 20th and 21st of December in the morning. Charlie Sing Lee left my place in the morning and returned some time in the evening about ten o'clock. Witness had a conversation with the defendant after he came back from the garden in the evening. The defendant was down at the China garden on the 21st of December, 1921, and came back that night to my store about ten o'clock.

CROSS EXAMINATION.

The reason I was in my store on the 20th of December, 1921, was because it was near Christmas and I thought my cousin was coming. I was not out of the store on that day until about 12:30 o'clock in the evening. I was also in my store all day on the 21st of December, 1921, until 12:30 o'clock in the evening. I was in my store all day on the 21st except when I went to the post office in the morning. If the witness Hill had come in my store on the 20th or 21st I would have known it.

FONG PING, a witness for the defendant, testified as follows:

Lives in Boise, Idaho, in a China garden. Garden is known as Chung Chong Yong. Is engaged in raising vegetables. The garden is located across the bridge in South Boise. Is acquainted with the defendant. Has known him a year and saw the defendant on the 20th of December, 1921. Charlie

Sing Lee first came down to my garden on the 19th of December, 1921. He came down there to help me pick vegetables and to try to buy an interest in the garden. He was down there during that time about five days. On the 20th of December, 1921, he came in the morning about ten o'clock and stayed until night. He left my place after supper, about ten o'clock, on the 21st day of December, 1921. Defendant came down to my garden about the same time as he did on the 20th and left about the same time in the evening. He was at my garden on the 22nd day of December and he left about nine o'clock in the evening of the 22nd. My garden is about twenty blocks from Harry Fong's store.

CROSS EXAMINATION.

Charlie walked down to my garden and he walked back. The defendant did not leave there before dark. We generally have supper about eight or half past eight o'clock. Defendant was at my place on the 23rd day of December also. The defendant is a gardener. Defendant worked in the gardens. He worked in November last year. On the 24th of December, 1921, defendant left my place in the afternoon. I forget what time.

FONG KING, a witness on behalf of the defendant, testified as follows:

Witness stays at Harry Fong's store. Has known defendant for three years. Met defendant on the 20th of December, 1921, in Harry Fong's

store. I went down to the China garden Chung Chong Yong about eleven o'clock and stayed there until nine or ten that night. Witness was contemplating on going in partners with the defendant in the garden. Witness and the defendant went down to the garden at ten or eleven o'clock in the morning and returned in the evening after supper about nine or ten o'clock and done the same on the 22nd day of December. Witness did not go with the defendant on the 24th of December. Witness went by himself on that day.

CROSS EXAMINATION.

Defendant went also on the 19th of December to the garden.

WILLIAM LEE JONES, a witness on behalf of the defendant, testified as follows:

Is in the restaurant business between Sixth and Seventh streets in Boise, Idaho. Was in that business on the 20th of December, 1921. Have known the defendant for about two years. Saw defendant on the 20th of December, 1921, over at the China garden. He was there sorting potatoes. Witness went over there to buy potatoes for his restaurant. Witness was at the China garden about half past twelve. Was there about an hour and a half. There were several Chinese there. Saw Fong King there. Saw defendant on the 21st of December, 1921. He was there at the garden. Saw him about one o'clock. Was there at that time about three-quarters of an

hour. Defendant was working there with potatoes and onions. Sacked some potatoes for the witness. Witness was down to the China garden about five o'clock in the evening of December 22, 1921. I stayed there that day until the delivery Chinaman came back about two hours afterwards. Have been in the restaurant business at the present place since December 20th, 1921. Witness was over on the 22nd day of December, 1921, on business. Witness had land to rent and wanted to rent it to the Chinamen. Has a lease on a place from Mr. Davis. Is going to rent it to Chinamen.

CROSS EXAMINATION.

MR. DAVIS: Q. Were you ever convicted of a felony, Mr. Jones?

MR. CAVANEY: We object as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. CAVANEY: Note an exception.

THE COURT: You may answer.

A. Yes, sir.

MR. CAVANEY: The defendant rests. I want the record to show, if Your Honor please, that I made the same motion as heretofore made, before the argument.

THE COURT: Very well. The same ruling.

WHEREUPON, after argument by counsel, the Court instructed the jury, explaining to jurors at length, under what circumstances government

agents may properly secure evidence against persons suspected of being engaged in the sale of narcotics in violation of the laws, and the limitation upon such right, and also again explaining that testimony of the witness Cole touching the employment and use of Hill was not to be considered as evidence of defendant's guilt; and also advising the jury upon other matters of law and criminal procedure.

CERTIFICATE.

The foregoing is hereby duly settled and allowed as the defendant's bill of exceptions, it being certified that it contains in substance all of the testimony in the case.

Dated March 17th, 1922.

FRANK S. DIETRICH,
Judge.

(Title of Court and Cause).

STIPULATION.

It is hereby stipulated by and between the respective parties hereto by their respective counsel herein that the above and foregoing Bill of Exceptions contains a full, true and correct transcript of all the proceedings had and all the evidence introduced upon the trial of said cause reduced to narrative form, together with all rulings made by the

Court therein pertaining to the issues raised by the writ of error filed herein.

Dated this 16th day of March, 1922.

P. E. CAVANEY,
Attorney for Defendant.
E. G. DAVIS,
U. S. District Attorney
for Idaho.

Endorsed: Filed March 17, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

PETITION FOR WRIT OF ERROR.

Now comes Charlie Sing Lee, the defendant herein, and says that on or about the 22nd day of February, 1922, said defendant was found guilty by a jury of the violation of the Act of December 17, 1914, as amended, and that on or about the 8th day of March, 1922, the Court pronounced judgment upon the said defendant in conformity with the said verdict of the jury, and said defendant complains and says that in the proceedings had prior thereunto in said cause errors were committed by the Court to the prejudice of this defendant. all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore said defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the said errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals for review.

Dated at Boise, Idaho, this 8th day of March, 1922.

CHARLIE SING LEE,
Petitioner.

P. E. CAVANEY,
Attorney for Petitioner.
Residence: Boise, Idaho.

Endorsed: Filed March 8, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

ASSIGNMENTS OF ERROR.

Said defendant in this action, in connection with his petition for a Writ of Error, makes the following Assignments of Error which he avers occurred upon the trial of the said case, to-wit:

1. The Court erred in denying defendant's motion to quash said indictment herein for the reasons the respective counts of said indictment did not charge an offense with such degree of certainty that

the Court may pronounce judgment upon conviction according to law.

(a) That two separate and distinct offenses are charged in the respective counts of said indictment, to-wit: An offense of dealing in and an offense of selling certain narcotics on the respective dates therein mentioned without having registered as required by said Act.

2. The Court erred in denying defendant's demurrer to the indictment herein for the reasons that the said indictment did not state facts sufficient to constitute an offense under the said Act.

3. That the Court erred in denying defendant's motion to require the Government to elect upon which count in the indictment it would prosecute said cause for the reason that the respective offenses alleged in the respective counts of said indictment are not such offenses as may be properly joined in the said indictment under the law.

4. The Court erred in refusing to strike on motion of the defendant the testimony of James Hill relating to an attempted sale and conversation relating to same subsequent to the time mentioned in the indictment.

5. The Court erred in permitting witness H. W. Ballaine over the objection of counsel for defendant to testify to a sale made by the defendant to Witness Ballaine subsequent to the dates alleged in the indictment.

6. The Court erred in stating to the jury the purpose for which he would permit evidence to be introduced of a subsequent sale to the time mentioned in the indictment as being circumstance bearing upon the question or issue raised as to whether or not the defendant was selling and dealing on the two preceeding days.

7. The Court erred in refusing to permit the Witness Ballaine on cross examination to answer the following question propounded to him by counsel for defendant: "Q. Were you relying absolutely on the statement of Mr. Hill in regard to whether or not he had made a purchase?" (Ballaine not being present when the alleged purchase was made by Hill from the defendant.)

8. The Court erred in permitting the Government, after it had rested its case and while the defendant was making a motion for a directed verdict, to permit the Government to re-open its case and introduce further proof upon the suggestion of the Court as to why the addict James Hill was used for procuring evidence in the case.

9. The Court erred in stating in the presence of the jury when Witness Cole was on the stand that he would permit the Government agents to show that the defendant had been suspected of selling these drugs without any previous evidence having been offered in said case showing that any sale had ever been made by the defendant prior to the dates alleged in the indictment.

10. The Court erred in permitting the Witness Cole, over the objection of counsel for defendant, to testify that he had reasons to believe that Charlie Sing Lee had been dealing in or selling narcotics prior to the dates alleged in the indictment but no particular sales or reasons were given by the witness for such belief.

11. The Court erred in asking the Witness Cole the following questions: Q. Did you know the defendant yourself? A. Yes, sir; I have known him for practically that length of time. Q. Had you been here frequently or infrequently? A. Oh, on an average of once a week for three or four days or a week or sometimes ten days. Q. I assume that the reason you say—I mean the reason you have given for believing that he was engaged in selling drugs that is the reason based upon reasons that came to you from different sources? A. Conversations with addicts and personal observation. Q. It was because of your information or that belief that you employed the witness here? A. Yes, sir. Q. He had been an addict? A. Yes, sir. Q. For the purpose of procuring evidence of the sale? A. Yes, sir; evidence.

12. The Court erred in giving the following instruction to the jury during the examination of the Witness Cole by the Court:

“Gentlemen, I will say to you, perhaps further in explanation of what I have already said in your presence, that you cannot consider the evidence just

given by this witness as to certain reports and rumors which may have come to him inducing him to believe that the defendant was engaged in the illicit sale of these drugs. You cannot consider those rumors or statements or the witness' belief as any evidence at all that the defendant here is guilty of these charges, or that he was in fact engaged in violating the law, or did in fact violate the law. The only purpose for which you can consider this evidence, and the only purpose for which I have received it, is to throw some light upon the circumstances under which this witness was employed, this former addict, to go to this place, for the purpose of getting evidence, and for the purpose of relieving the Government of the imputation or charge that it was seeking to and did induce an innocent man to violate the law. I will explain more fully the principle by which you are to be governed in passing upon this evidence later on. It is enough to say now that you are not to consider it as evidence of the defendant's guilt.

13. The Court erred in instructing the jury while Witness Hill was on the stand, over the objection of the defendant, that the words used in the said Act under which the indictment was found "deal in and sell" meant one and the same thing, and that they were not separate and distinct offenses under the said Act.

14. The Court erred in denying defendant's motion to instruct the jury to find the defendant not

guilty after the Government had closed its case for the reason that there had been no legal or competent evidence upon which the guilt of the defendant had been established by the Government, and for the further reason that the only evidence of any sale having been made of narcotics to the Witness Hill was uncorroborated testimony of the Witness Hill.

15. The Court erred at the close of the case in refusing to instruct the jury to find the defendant not guilty for the reason that there was no legal or competent evidence to justify the Court in submitting the case to the jury for the reason that the uncontradicted evidence of the defendant showed that the said defendant was not present at the time and place that the alleged sale and that there was no evidence whatever or at all to establish the fact that any sale of cocaine or morphine had ever at any time been made by the defendant to the Witness Hill or to any other person upon the dates mentioned in the indictment.

WHEREFORE, defendant prays that the judgment of the District Court may be reversed.

P. E. CAVANEY,

Attorney for Defendant.

Residence: Boise, Idaho.

Service of the above Assignments of Error by copy admitted and accepted this 8th day of March, 1922.

E. G. DAVIS,
U. S. Dist. Attorney.

Endorsed: Filed March 8, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

ORDER.

This 8th day of March, 1922, came the defendant, Charlie Sing Lee, by his attorney, P. E. Cavaney, Esq., and filed herein and presented to the Court his petition, praying for the allowance of a Writ of Error, an Assignment of Errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the said Writ of Error. The defendant, Charlie Sing Lee, may be admitted to bail pending such appeal in the sum of Two Thousand Five Hundred Dollars.

Dated at Boise, Idaho, this 8th day of March, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed March 8, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

PRAECIPE.

To the Clerk of the Above Entitled Court:

You are hereby requested to transmit in printed form to the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the following portions of the record, papers and files in the above entitled cause, to-wit:

1. Indictment.
2. Defendant's Assignments of Error.
3. Motion to Quash.
4. Demurrer.
5. Motion to Elect.
6. The minutes of the Court relating to said cause.
7. Defendant's Bill of Exceptions.
8. Petition for Writ of Error.
9. Order allowing Writ of Error.
10. Writ of Error.
11. Citation.
12. This Praecipe.

Dated at Boise, Idaho, this 11th day of March, 1922.

P. E. CAVANEY,
Attorney for Defendant.
Residence: Boise, Idaho.

U. S. Dist. Attorney.

W. D. McREYNOLDS, Clerk.

VS.

Defendant.

WRIT OF ERROR.

The United States of America,)
) ss.
Ninth Judicial District,)

*The President of the United States to the Honorable
Judge of the District Court of the United States
for the District of Idaho, Southern Division.*

GREETING:

Because of the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court, before you between the United States of America, plaintiff, and Charlie Sing Lee, defendant, a manifest error hath happened, to the injury of said Charlie Sing Lee, de-

fendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at San Francisco, California, in the said Circuit on the 10th day of April, A. D. 1922, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done, therein to correct said error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 9th day of March, A. D. 1922, and in the 45th year of the Independence of the United States of America.

Allowed by:

FRANK S. DIETRICH,

U. S. District Judge.

Attest:

SEAL)

W. D. McREYNOLDS,

*Clerk of the District Court of
the United States for the Dis-
trict of Idaho, Southern Divi-
sion.*

Service accepted March 8, 1922.

E. G. DAVIS.

U. S. District Attorney.

Endorsed: Filed March 9, 1922.

W. D. McREYNOLDS, Clerk.

*The United States Circuit Court of Appeals, for the
Ninth Judicial Circuit.*

UNITED STATES OF AMERICA.

Plaintiff,

VS.

CHARLIE SING LEE.

Defendant.

Criminal, 810.

CITATION.

The United States of America,)
Ninth Judicial District.) ss.

The President of the United States to Hon. E. G. Davis, United States District Attorney for the District of Idaho.

GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the City of San Francisco, California, in the said Circuit, on the 10th day of April, 1922, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein

Charlie Sing Lee is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable F. S. Dietrich, District Judge of the United States for the District of Idaho, Southern Division, at Boise, Idaho, within said District, this 9th day of March, A. D. 1922, and the 45th year of the Independence of the United States.

FRANK S. DIETRICH,
U. S. District Judge.

Service accepted March 8th, 1922.

E. G. DAVIS,
U. S. District Attorney.

Endorsed: Filed March 9, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause).

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 67 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein

upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praeipie filed herein.

I further certify that the cost of the record herein amounts to the sum of \$78.70, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court this 7th day of April, 1922.

W. D. McREYNOLDS,
Clerk.

-5-

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of ELLIOTT-O'BRIEN COMPANY, a
Corporation, Bankrupt.

S. G. CLIMENSON, as Trustee of ELLIOTT-O'BRIEN
COMPANY, a Corporation, Bankrupt,
Appellant,

vs.

CARSON, PIRIE, SCOTT & COMPANY, a Corporation,
COFFMAN, DOBSON BANK & TRUST COM-
PANY, a Corporation, BEE NUGGETT PUB-
LISHING COMPANY, a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

FILED
MAY 29 1922
F. D. MONKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

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Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

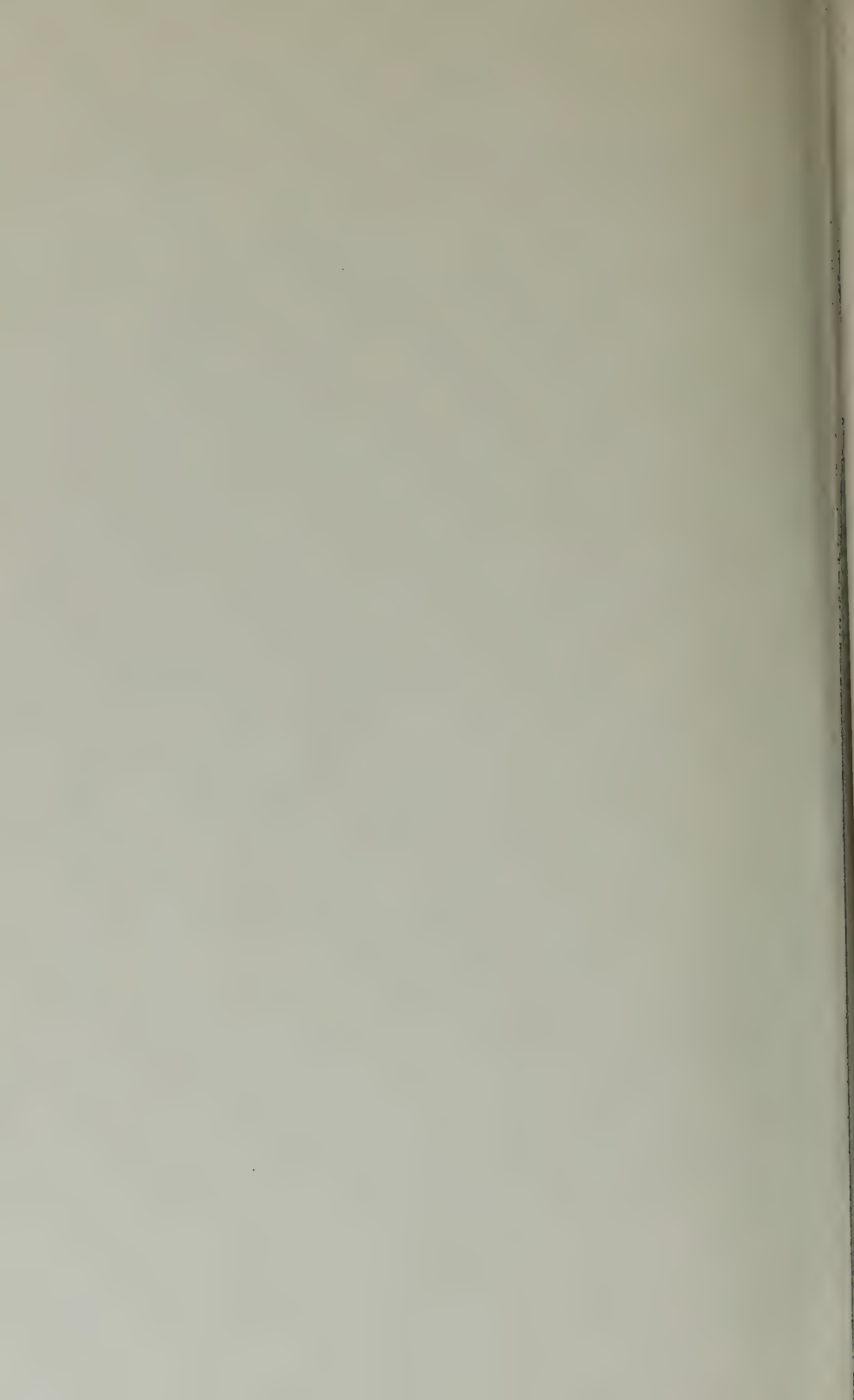
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Claim of Carson, Pirie, Scott & Co.

PROOF OF DEBT AND POWER OF ATTORNEY.

At Chicago, in the county of Cook and state of Illinois, on the sixteenth day of May, 1921, comes W. H. Whiteside of said county and State, and says:

That he is Asst. Treasurer of Carson, Pirie, Scott & Co., a corporation organized under and existing by virtue of the laws of the State of Illinois, and hereinafter designated as claimant.

That said claimant is doing business at the place, county and state aforesaid, and that affiant is duly authorized to make this proof, and execute this power of attorney, and that said bankrupt was, at and before the time the petition in bankruptcy was filed herein, and still is, justly and truly indebted to the said claimant in the sum of Two Thousand Nine Hundred Seventy-six and 80/100 Dollars.

That the consideration of said debt is as follows:

Goods, wares and merchandise, sold and delivered to the said bankrupt, at their special instance and request according to statement hereto attached and marked Exhibit "A."

That no part of said debt has been paid, except —; that there are no offsets or counterclaims to the same except —, and that this deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use, had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor, or any part thereof, nor has any

note or other evidence of said debt been received, except as herein stated.

Said claimant hereby constitutes and appoints Seattle Merchants Association of Seattle, Wash., and ——, attorney in fact to join with other creditors and proceed in bankruptcy against the above-named debtor, under the provisions of the Act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States, approved July 1, 1898," and the amendments thereto, and to execute in the name of the undersigned, any usual or necessary petition or paper in that behalf and to represent the claimant at all meetings of creditors herein, with authority to vote for Trustee, also to accept any composition proposed by said bankrupt in satisfaction of their debts, and upon all propositions submitted to the creditors, and to receive dividends and all notices in said cause.

W. H. WHITESIDE,

Asst. Treas.

[Indorsed]: Filed this Jun. 10, 1921, 10 A. M.
R. F. Laffoon, Referee in Bankruptcy. [2*]

Claim of Coffman-Dobson Bank & Trust Co.

COMBINATION PROOF FOR DEBT DUE
CORPORATION, PARTNERSHIP, IN-
DIVIDUAL, SECURED OR UNSECURED.

At Chehalis, in the Western District of Washington, on the 27th day of May, 1921, A. D., came D.

*Page-number appearing at foot of page of original certified Transcript of Record.

T. Coffman, of Chehalis, in the District of Washington, and made oath and says that:

(1) (a) He is the Cashier of the Coffman-Dobson Bank & Trust Co. (there being no Treasurer of said Corporation), a corporation incorporated by and under the laws of the State of Washington, and carrying on business at Chehalis, in the County of Lewis and State of Washington, and that he is duly authorized to make this proof and says that the said Elliott-O'Brien Co., the person (firm or corporation) by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly indebted to said corporation.

(b) He is one of the firm of —, consisting of himself and — of — in the County of —, the person (firm or corporation) by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly indebted to the deponent's said firm.

(c) — the person (firm or corporation) by (or against) whom a petition for the adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent.

In the sum of (2) Eighteen Hundred Fifty-six and 92/100 (\$1856.92) Dollars; that the consideration of the said debt is as follows:

(3) Money loaned to said bankrupt by claimant at the request of said bankrupt and remaining unpaid and past due, more particularly set forth in

the itemized account hereto annexed and made a part of this proof; that no part of said debt has been paid, except as shown by said account; that there are no setoffs or counterclaims to same except as shown by said account;

(4) That the said Coffman-Dobson Bank & Trust Co. has not, nor has any person by its order, or to the knowledge and belief of said deponent, for its use, had or received any manner of security (4) whatever, for such account; nor has any judgment been rendered thereon (3).

And that the only securities held by said Coffman-Dobson Bank & [3] Trust Co. for said debt are the following (listing and describing securities): none. That the duties of affiant correspond most nearly with those of Treasurer of a corporation, there being no Treasurer of claimant corporation.

D. T. COFFMAN,

Cashier of Coffman-Dobson Bank & Trust Co.

[Indorsed]: Filed this June 10, 1921, 10 A. M.
R. F. Laffoon, Referee in Bankruptcy. [4]

**Objections of Trustee to Claim of Carson, Pirie,
Scott & Company.**

Comes now S. G. Climenson, trustee herein, by his attorney, Nelson R. Anderson, and respectfully shows the Court:

I.

That at all times herein mentioned, Elliott-

O'Brien Company was a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business at Chehalis, Washington.

II.

That on the 17th day of May, 1921, the said Elliott-O'Brien Company, a corporation, was declared and adjudged bankrupt within the meaning of the Acts of Congress relating to bankruptcy by the above-entitled court and the Hon. Edward E. Cushman, Judge thereof, upon petition alleging bankruptcy filed in said court on May 10, 1921; that thereafter, and in due course of proceedings in said bankruptcy, S. G. Climenson was elected trustee of the bankrupt estate of Elliott-O'Brien Company and is the duly elected, qualified and acting trustee of said estate.

III.

That on January 10, 1921, said bankrupt was indebted to Carson, Pirie, Scott & Co., in the sum of \$6590.47 for goods, wares and merchandise sold and delivered by said claimant to said bankrupt; that thereafter said indebtedness was increased by sales of merchandise and by charges for interest as follows: [5]

Balance Jan. 1, 1921.....				\$6590.47
Bal. due on remittance of 2/24/21 Int. for overtime.....				3.64
Bal. due on remittance of 2/4/21 Credit used twice.....				2.25
Bal. due on remittance of 4/29/21 Int. for overtime.....				17.59
Bal. due on remittance of 3/5/21 Int. for overtime.....				5.37
Bal. due on remittance of 4/1/21 Int. for overtime.....				8.19
1921	Net Cash	2% 10 days	6% 10 days	
Jan. 6		16.91		
7		233.76		
8		9.85	.65	
12	11.25			
13	15.91			
17		210.93		
		5.32		
Mar. 8		61.50		
24		33.51		
31		30.48		
	Crd. Mdse.			
Jan. 5		14.62		
6		21.14		
18	25.97			
13	9.00			
	7.81	566.50	.65	599.34
				<u>\$7186.85</u>

IV.

That after January 10, 1921, the bankrupt herein made the following payments to said claimant on account on the dates hereinafter set forth, to wit:

Jan. 25.....	265.50
27.....	495.55
Feb. 4.....	517.54
24.....	661.59
Mar. 5.....	715.80
Apr. 1.....	589.66
25.....	500.00
29.....	508.47

\$ 4254.11 [6]

V.

That the foregoing payments amounting to \$4,254.11 were made by said bankrupt to said claimant within four months of the filing of said petition in bankruptcy and while said bankrupt was insolvent, to apply on the general unsecured claim of said claimant amounting to \$7,186.85, and that by virtue of said payment said claimant secured an unlawful preference over other creditors of the same class as said claimant in the estate of said bankrupt, thereby depleting the estate of said bankrupt to the damage and injury of the general and unsecured creditors of said bankrupt of the same class as the claimant; that said claimant knew or had reasonable cause to believe that said transfers and payments then operated as a preference under the Acts of Congress relating to bankruptcy and prohibiting a preference of creditors.

VI.

That on January 1, 1921, the bankrupt was indebted to claimant in the sum of \$6,590.47 and thereafter became further indebted to said claimant in the sum \$667.11. That after January 1, 1921, the bankrupt paid said claimant \$4,324.84 to apply on said indebtedness.

That said payments of \$4,324.84 by said bankrupt to said claimant paid current account of said claimant for 1921 one hundred per cent (100%) and in full, and a payment of \$3,657.73 to apply on the indebtedness existing on January 1, 1921, resulting to payment of 55% of the old account of said claimant.

That the indebtedness of said bankrupt to the other creditors of said bankrupt on January 1, 1921, amounted to \$4,275.41 and that the creditors herein have received no percentage on their indebtedness due on January 1, 1921, except 90% to Fleischner, Myer & Co., Royal Worster Corset Company and 20% to the Bee Nugett Publishing Company who have received preferences to that extent. That the assets of the bankrupt during 1921 were depleted by payment made to said claimant in the sum of \$4,324.84, less the amount of merchandise furnished said bankrupt [7] by said claimant in the sum of \$667.11, thereby diminishing the assets of said bankrupt by the sum of \$3,657.73. That during 1921 the other creditors of said bankrupt were furnishing merchandise to said bankrupt for the entire amount of the indebtedness of the estate herein in the sum of \$9,971.62, while said claimant was withdrawing from the assets of said bankrupt the sum of \$3,657.73 over and above all merchandise furnished by it to said bankrupt; that the result and effect of the dealings between claimant and bankrupt was to prefer said claimant over and above the other creditors of said bankrupt by the bankrupt receiving merchandise from the other creditors and taking the proceeds of the sales of said merchandise and paying them over to said claimant, thereby depleting and diminishing the assets of said estate to the damage and injury of said other unsecured creditors for the use and benefit of claimant herein; that said bankrupt on January 1, 1921, and at all times since was and is now in-

solvent, in this, that said bankrupt was unable to meet and pay its obligations in due course of business.

That the payments made by said bankrupt to said claimant resulted in said claimant receiving an unlawful preference over the other creditors of said bankrupt within the meaning of the laws of the State of Washington prohibiting insolvent corporations from giving any of its creditors an undue preference under the Trust Fund theory prevailing in said state.

WHEREFORE petitioner prays the Court that the claim of Carson, Pirie, Scott & Co., be disallowed, or be charged with receipt of a dividend equal to sixty per cent (55%) of its claim, and that it receive dividends on its claim only in the event that the dividends paid to creditors herein exceed the sum of sixty per cent (55%) and then only as to such excess payment over and above sixty per cent (55%).

S. G. CLIMENSON,
Trustee. [8]

[Indorsed]: Filed this Sep. 24, 1921, 10 A. M.
R. F. Laffoon, Referee in Bankruptcy. [9]

**Objections of Trustee to Claim of Coffman-Dobson
Bank & Trust Co.**

Comes now S. G. Climenson, trustee herein, by his attorney, Nelson R. Anderson, and respectfully shows the Court:

I.

That at all times herein mentioned Elliott-O'Brien

Company was a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business at Chehalis, Washington.

II.

That on the 17th day of May, 1921, the said Elliott-O'Brien Company, a corporation, was declared and adjudged bankrupt within the meaning of the Acts of Congress relating to bankruptcy by the above-entitled court and the Hon. Edward E. Cushman, Judge thereof, upon petition alleging bankruptcy, filed in said court on May 10, 1921; that thereafter, and in due course of proceedings in said bankruptcy, S. G. Climenson was elected trustee of the bankrupt estate of Elliott-O'Brien Company and is the duly elected, qualified and acting trustee of said estate.

III.

That Coffman-Dobson Bank & Trust Company, a corporation, has filed its claim for money loaned in the sum of \$1800 and interest. [10]

That on January 1, 1921, said bankrupt was indebted to Coffman-Dobson Bank & Trust Company in the sum \$5,500 for money loaned; that thereafter said indebtedness was increased by further loans and was reduced by payments as follows, to wit:

Jan. 1, 1921, 3 month note....	\$ 2500.00	
Jan. 1, 1921, 3 month note....	1000.00	
Jan. 1, 1921, note	2000.00	
Jan. 22, 1921, 10 day note....	500.00	
Mch. 4, 1921, 7 day note.....	300.00	\$ 6300.00

CREDITS:

Credit on \$2500 note: April 14..	\$ 500.00	
19..	500.00	
23..	500.00	
27..	500.00	
May 2..	500.00	\$2500.00
<hr/>		
Credit on \$1000 note, April 5..	500.00	
9..	500.00	
Credit on Jan. 22 note, Feb. 22..	500.00	
Credit on Mch. 14 note, Mch. 17..	300.00	
Credit on Jan 1st note of \$2000	143.08	
(See claim filed herein)		\$1943.08
<hr/>		
Total credits		\$4443.08

V.

That the foregoing payments amounting to \$4,500 were made by said bankrupt to said claimant within four months of the filing of said petition in bankruptcy and while said bankrupt was insolvent, to apply on the general unsecured claim of said claimant amounting to \$6,300.00, and that by virtue of said payment said claimant secured an unlawful preference over other creditors of the same class as said claimant in the estate of said bankrupt, thereby depleting the estate of said bankrupt to the damage and injury of the general unsecured creditors of said bankrupt of the same class as said claimant; that said claimant knew or had reasonable cause to believe that said transfers and payments then operated as a preference under the

acts of Congress relating to bankruptcy and prohibiting a preference of creditors. [11]

VI.

That on January 1, 1921, the bankrupt was indebted to said claimant in the sum of \$5,500 and thereafter became further indebted to said claimant in the sum of \$800, making a total indebtedness of \$6,300. That after January 1, 1921, the bankrupt paid said claimant \$4,500 and interest, to apply on said indebtedness.

That said payments of \$4,500 by said bankrupt to said claimant paid the current account of said claimant for 1921 amounting to \$800, 100% and in full, and made a payment of \$3,700 to apply on the indebtedness existing on January 1, 1921, of \$5,500, resulting in a payment of 67% of the old account of said claimant.

That the indebtedness of said bankrupt to other merchandise creditors of said bankrupt on January 1, 1921, amounted to \$4,275.41 and that the creditors herein have received no percentage on their indebtedness due January 1, 1921, except 9% to Fleischner, Myer & Co., and Royal Worcester Corset Company, 20% to Bee Nuggett Publishing Co., and 55% to Carson, Pirie, Scott & Co., who have received preference to that extent and to whose claims objections have been made on the ground of preference; That the assets of the bankrupt during 1921 were depleted by payments made to said claimant in the sum of \$4,500, less the amount of moneys loaned said bankrupt by said claimant in the sum of \$800, thereby diminishing the assets of

said bankrupt by the sum of \$4500 and interest. That during 1921 the other creditors of said bankrupt were furnishing merchandise and credits to said bankrupt for the entire amount of the indebtedness of the estate herein in the sum of \$9,971.62 while said claimant was withdrawing from the assets of said bankrupt the sum of \$4,500 over and above all credits furnished by it to said bankrupt; that the result and effect of the dealings between claimant and bankrupt was to prefer said claimant over and above the other creditors of said bankrupt by the bankrupt receiving merchandise and credits from the other creditors and taking the proceeds of the sales of said merchandise and paying them over to said claimant, thereby depleting and diminishing the assets of the estate herein to the [12] damage and injury of said other secured creditors for the use and benefit of claimant herein; that said bankrupt on January 1, 1921, and at all times since, was and is now insolvent, in this, that said bankrupt was unable to meet and pay its obligations in due course of business.

That the payments made by said bankrupt to said claimant resulted to said claimant receiving an unlawful preference over other creditors of said bankrupt within the meaning of the laws of the State of Washington prohibiting insolvent corporations from giving any of its creditors an undue preference under the Trust Fund theory prevailing in said State.

WHEREFORE, petitioner prays the Court that the claim of Coffman-Dobson Bank & Trust Com-

pany be disallowed, or be charged with receipt of a dividend equal to 67% of its claim and that it receive dividends on its claim only in the event that the dividends paid to creditors herein exceed the sum of 67%, and then only as to such excess payment over and above 67%.

S. G. CLIMENSON,
Trustee.

[Indorsed]: Filed this Sep. 24, 1921, 10:00 A. M.
R. F. Laffoon, Referee in Bankruptcy. [13]

**Answer of Carson, Pirie, Scott & Co. to Objections
of Trustee.**

Carson, Pirie, Scott & Co., answering the objections filed by the trustee to its claim duly verified and filed herein:

I.

Admits the allegations of paragraphs I, II, III and IV of said objections, except that the claimant alleges that the true amount of plaintiff's claim was \$7,216.29, on which \$4,254.11 was paid, leaving a balance of \$2,962.18.

II.

Denies each allegation of paragraphs V and VI of said objections except as herein and in said claim admitted.

GEORGE N. WOODLEY, and
McCLURE & McCLURE,
Attorneys for Claimant.

[Indorsed]: Filed this Nov. 5, 1921. R. F. Laffoon, Referee in Bankruptcy. [14]

Order Allowing Claims.

WHEREAS, heretofore on the —— day of December, 1921, came on regularly for hearing and determination the objections of the trustee, to the allowance of the claims of Carson, Pirie, Scott & Co., Coffman-Dobson Bank & Trust Co., and Bee-Nugget Publishing Co., the trustee appearing personally and by his counsel, Nelson R. Anderson, in support of said objections and Carson, Pirie, Scott & Co., appearing by their counsel, Geo. N. Woodley, Esq., and Walter A. McClure, Esq., Coffman-Dobson Bank & Trust Co., and Bee-Nugget Publishing Co., appearing by their counsel, A. A. Hull, Esq., and testimony being offered in support of said objections and in opposition thereto, and the matter having been submitted to the Referee for his consideration and decision thereon, now, after due consideration of the law and the premises, and being in all things fully advised, the Referee does hereby **ORDER:**

That the objections aforesaid be, and they hereby are, dismissed, and the claims of said claimants objected to as aforesaid be, and they hereby are, allowed and established as valid claims against the estate of said bankrupt. Trustee excepts to order and whole thereof. Exception allowed.

Dated at Tacoma, December 9, 1921.

R. F. LAFFOON,
Referee.

[Indorsed]: Filed this Dec. 9, 1921, 10 A. M.
R. F. Laffoon, Referee in Bankruptcy. [15]

Petition of Trustee for Review of Referee's Order.

Comes now S. G. Climenson as trustee of the above-named bankrupt, and respectfully shows the Court:

I.

That petitioner filed objections to the claims filed herein by Carson, Pirie, Scott & Co., Coffman-Dobson Bank & Trust Co., and Bee-Nuggett Publishing Co., on the ground of preferences and a hearing was had on the issue joined between the trustee and said claimants and the referee having made a decision in favor of said claimants and an order thereon having been duly filed and entered herein, wherein the objections of the trustee were dismissed and the claims of said claimants were allowed, and the trustee having duly excepted thereto and his exception having been regularly allowed, and the trustee feeling himself aggrieved by said decision and said order and said order being erroneous, in this, that said objections should have been sustained and said claims disallowed; that a review of said proceedings and said order should be had before the United States District Judge herein.

[17]

WHEREFORE, trustee prays that said order be reviewed and reversed and that an order be entered sustaining the objections filed by the trustee to the claims of said claimants.

NELSON R. ANDERSON,

Attorney for Trustee.

[Indorsed]: Filed this Dec. 15, 1921, 11 A. M.
R. F. Laffoon, Referee in Bankruptcy. [18]

Referee's Certificate on Review.

To the Honorable EDWARD E. CUSHMAN, District Judge:

I, R. F. Laffoon, the Referee in Bankruptcy in charge of this proceeding, DO HEREBY CERTIFY:—

That, in the course of such proceeding, an order, a copy of which is annexed to the petition herein-after referred to, was made and entered on the 9th day of December, 1921.

That, on the 15th day of December, 1921, in such proceeding, feeling aggrieved thereon, the trustee herein filed a petition for review, which was granted.

That a summary of the evidence on which such order was based is as follows:

Adjudication was had herein on the 21st day of May, 1921. The claimant, Carson, Pirie, Scott & Co., a corporation, filed its claim herein on June 10, 1921 for the sum of \$2976.80. On September 24, 1921, the trustee filed objections to said claim, and the allegations in paragraph VI thereof were:

“That on January 1, 1921, the bankrupt was indebted to the claimant in the sum of \$6,590.47 and thereafter became further indebted to said claimant in the sum of [19] \$667.11; that, after January 1, 1921, the bankrupt paid said claimant \$4,324.84 to apply on said indebtedness; that said payment of \$4,324.84 by said bankrupt to said claimant paid the current account of said claimant for 1921 (100%) and in

full, and a payment of \$3,657.73 to apply on the indebtedness existing on January 1, 1921, resulting in the payment of fifty-five (55%) per cent of the old account of said claimant."

Said objections conclude with a prayer that claimant's claim be disallowed, or that it be charged with receipt of a dividend equal to 55% of its claim, or that it receive no dividends on its claim until all other claimants have received dividends of 55%.

Claimant, in reply, alleged that the true amount of its claim was \$7,216.29, on which \$4,254.11, was paid, leaving a balance of \$2,962.18.

It was conceded that the bankrupt was incorporated in 1917 with a capital stock of \$15,000 paid in in cash, Ed O'Brien taking half the stock and William F. Elliott the other half; that Elliott paid in \$3,000 of his own funds and borrowed the remainder, \$4,500, from Charles O'Brien to finish paying for his stock and pledged his shares to Charles O'Brien to secure the loan; that Ed died and his estate passed into the hands of Charles, giving him control of the whole capital stock, which he held on about November, 1920.

William F. Elliott was manager of the business, the O'Briens taking no part in the managing. William F. Elliott was examined as a witness in this hearing and gave a comprehensive statement of the affairs of the bankrupt.

He states, on pages 29 and 30 of the transcript of testimony, that he and the O'Briens were salesmen for the claimant herein, Carson, Pirie, Scott & Co.,

prior to the inception of this *bankrupt* and the launching of this business.

It appears that, in about November, 1920, Charles [20] O'Brien and the O'Brien Estate were desirous of getting out of the business and sought to have the stock of goods reduced and the debts paid and the business sold out. The witness (the manager) proceeded to do this by putting on sales and running the stock down as best he could and so continued until he left on April 26, 1920.

He testifies, on pages 40 and 41, that, on January 1, 1921, they owed debts past due \$3,970.68,
debts not due 7,108.15,
and the bank 5,500.00,

making a total of \$16,578.83.

On pages 42 and 43, he testified that the total indebtedness for merchandise for February 1st, was \$12,727.53,
March 1st 14,316.24,
April 1st 12,616.61,
and that for sales for January were 6,026.99,
February 4,636.94,
March 4,417.19,
April 8,877.46,
and on page 44 that he bought goods during January, amounting to 2,580.16,
February 3,274.15,
March 4,478.35,
April 249.84,

and, on page 45, that the expenses per month were:

January	\$2,396.78,
February	1,548.49,
March	1,583.84,
April	2,806.29.

[21]

and that during the years 1917, 1918, 1919 and 1920, Carson, Pirie, Scott & Co. was the principal creditor; that they bought about fifty per cent of their goods from that firm, and that during the year 1920 their indebtedness to that firm was about \$16,000. On page 53 he says that Carson, Pirie, Scott & Co. sold them \$566.50 worth of goods and afterwards refused to extend them any further credit until they brought up their past due bills; that Carson, Pirie, Scott & Co. wanted to get back to the 120 days limit of credit. On page 67 he says that the indebtedness for merchandise December 30, 1920, was \$16,240.92, as compared with that for April 26, 1921, \$12,616.61, and on page 68 that the inventory taken January 31, 1921, was \$26,371.39 and, on page 69, that the net worth December 31, 1920, was \$14,230, and that their inventory made April 22, 1921, shows a net worth of \$2,000, showing a net loss of \$12,000, during said time; that it cost \$10,000 to \$11,000 to do business for four months.

Mr. George Walker testifies (page 90 of the transcript) that he was receiver in the state court and took charge of the store on May 7, 1921, and that he took an inventory of the stock and fixtures showing the stock and fixtures as of the value of \$16,200, on a cost basis, and that 25% should be

deducted therefrom for depreciation of value from cost. The receiver subsequently sold the stock and fixtures for \$11,000, as reported to this court.

The claims filed in this cause to date amount to \$6,740.29. I have no doubt from this *résumé* of figures that the bankrupt was insolvent in December, 1920, when the manager, as stated, started in to reduce the stock and pay the debts. The manager made every [22] possible effort to reduce the stock which could be made and to pay the debts during January, February, March and up to April 25th, when he abandoned the business and took service with the claimant herein, as he said because he had no further interest in the business.

In December, 1920, the bankrupt owed for merchandise about \$16,240.92 and owed the bank \$5500, making a known indebtedness of \$21,740.92. Its inventory taken about December 31, 1920, was about \$26,371.39, about \$4,000 of which covered fixtures, leaving the net stock about \$22,371.39, or about \$630.47 more than the known debts. It would cost, and did cost more than \$630.47 to convert the stock into cash for the payment of the debts. In fact, it cost about \$12,000, so that insolvency existed then and never got any better.

The estate came over into this court with an inventory valuation of \$16,200, less 25% depreciation, and proved indebtedness of \$16,740.29, and sold for \$11,000, net.

There is no question but what the claimant herein received from the bankrupt, after January 1, 1921, and before April 26, 1921, and within the four

months period the total sum of \$3,657.73 to apply on its old account. The trustees contend that, at the time and times on which claimant received the several payments which made up this sum, it had knowledge of the insolvency of the bankrupt and good reason to believe it was receiving a preference in that amount.

On the other hand, claimant contends that the several payments received by it were made in due course of business and that the circumstances were not such as would lead it to believe that it was receiving a preference. The inventory showing was very good, \$26,371.39, and, while the debt to claimant was very [23] large, yet the inventory would seem sufficient to pay it, and that, together with the manager's contention that he would reduce the stock and pay its debts, which he did actually proceed to do, might very easily lead claimant to believe that the manager was reducing all debts and not merely its debts.

Unless claimant had inside information, it could not know that the forced sale meant insolvency, or that one creditor was getting its debts paid to the exclusion of others. The fact that the O'Briens and the manager were former salesmen of the claimant would not bring home to it knowledge of the bankrupt's true condition and it has not been shown that claimant had actual knowledge. I do not believe that the claimant had knowledge of the insolvent condition of the bankrupt or sufficient reason to believe that it was receiving a preference.

Claimant's (Respondent's) Exhibit No. 2, fur-

nished claimant and others about January 1, 1921, purports to show the resources and liabilities as of December 31, 1920, and a net worth of \$14,230.35, which, while it shows an impairment of the capital, does not show insolvency and, unless claimant had knowledge of the purpose of the dominant stockholder to close out the business, it was not likely to suspect insolvency.

As I understand the trustees contention, it is not material whether the creditor receiving the alleged preference knew of the insolvency or not, if he actually received a preference, he cannot hold it as against the other creditors under the state rule.

I have considered the cases cited by the trustees and believe *Williams vs. Davidson* (104 Wash. 315) to be the [24] strongest case cited in support of that theory. I do not think that the case cited goes that far. Mrs. Davidson, the creditor receiving the preference, bought up the whole estate and agreed to pay all creditors and in good faith thought she had done so, but unknown creditors appeared and claimed a part of the estate and the Court let them in. It is clear that she knew the estate was insolvent when she took it over and that she took it all and left nothing for the other creditors, should there be others.

In *Thompson vs. Huron Lumber Co.* (4 Wash. 600) the creditors receiving the preference had knowledge of the insolvency and the giving of the preference.

In *Simpson vs. Western Hardware and Metal Co.* (97 Wash. 626), the creditor receiving the pref-

erence had notice of the insolvency and that he was receiving a preference.

In *Jones vs. Hoquiam Lumber & Shingle Co.* (98 Wash. 172), the creditor, likewise, had notice of the insolvency. The corporation was unable to pay in money and the creditor took real property instead.

The case at bar is distinguished from the cases relied on by the trustee in that the creditor was informed by the manager that he could pay his debts by reducing the stock. Furthermore, claimant was not demanding full payment of its debt, but simply that its debt be brought down to the maximum credit limit, 120 days. So far as the record shows, all of the other claims were well within that limit.

The claim is made that the goodwill of this bankrupt was a valuable asset and should be considered in determining the solvency of the bankrupt. The testimony does not fix any definite value and I am unable to fix any. [25]

Goodwill, to have a commercial value, must yield a profit. An inspection of this record does not show that this company ever paid any dividends to its stockholders or that it ever made any profit. The \$15,000 cash capital stock was worth from five to six per cent in the investment market. If their goodwill did not yield a profit over and above that five or six per cent, it was of no value. The location in the city was advantageous and enabled the receiver to make an advantageous sale of the estate. I do not see how a value could attach to a

goodwill that would not yield more than salaries and wages to clerks. It did not save the capital from impairment—although the manager, Elliott, thought it valuable, as well as Mr. Hart, who succeeded to the management on April 27, 1921.

If the bankrupt had been making a profit—unless it paid it out in dividends, which it did not do, it would have shown in the inventory. The inventory (Respondent's Exhibit No. 2) only shows an impairment of the capital.

The bankrupt had no means of getting money to pay its debts, but by selling its goods and the cost of selling depleted the estate without paying the debts. Claimant received all of the payments here complained of during the time the manager was running off his stock and, in my opinion, does not come within the rule contended for by the trustees—the "Trust Fund Theory."

The question presented on this review is whether or not the claimant should be held to have received a preference under the Act of Bankruptcy or under the laws of the State of Washington under the "trust fund theory."

I hand up herewith, for the information of the Judge, [26] the following papers:

1. The record book of this proceeding;
2. The petition on which this certificate is granted;
3. The transcript of the evidence taken and the exhibits admitted;
4. Briefs of counsel;
5. All other papers filed with me herein which are pertinent to this review.

Dated, Tacoma, Washington, January 27, 1922.

Respectively submitted:

R. F. LAFFOON,
Referee in Bankruptcy.

ADDENDA.

The question involved in the claim of the Coffman-Dobson Bank & Trust Company is the same as the foregoing. Dan Coffman, Cashier says that, on January 1, 1921, Mr. Elliott handed him Respondent's Exhibit No. 2; that the notes representing the bank's claim of \$5,500, which had theretofore been carried as one day notes were executed as time notes to fall due April 1st; that, when the notes fell due, he called Mr. O'Brien over and asked him what he could do about it and he, O'Brien, promised to pay it off \$1,000 a week. He further states, at page 145 of the transcript, that the bank was liquidating as any other bank was and, if they had cleared up their notes, the bank would likely have accommodated them again; that the bankrupt changed its bank account on May 3d and that incident put the bank on inquiry as to the [27] bankrupt's condition.

My holding is the same here as in the matter of the Carson, Pirie, Scott & Co. claim.

R. F. LAFFOON,
Referee in Bankruptcy.

The same question is raised in the claim of the Bee Nugget Publishing Company and my holding is the same in this.

R. F. LAFFOON,
Referee in Bankruptcy.

[Indorsed]: Filed this Jan. 27, 1922. R. F. Laffoon, Referee in Bankruptcy. [28]

Order Approving Ruling of Referee.

This cause having heretofore come regularly on for hearing on review of the ruling of R. F. Laffoon, referee in bankruptcy, in the matter of the objections of S. J. Climenson, trustee, to the allowance of the claims of Carson, Pirie, Scott & Co., Coffman-Dobson Bank & Trust Company, and the Bee-Nugget Publishing Company, the trustee appearing by Nelson R. Anderson, his attorney, and said creditors appearing by George N. Woodley, Walter A. McClure and A. A. Hull, their attorneys, and said matter having been argued and submitted and the Court having heretofore made and filed his memorandum decision in writing that the ruling of the referee should be approved,—

IT IS ORDERED that said ruling be, and the same is hereby, approved and that the objections of the trustee to said claims be, and the same are hereby, overruled and said claims allowed as filed, to which the trustee excepts and his exception is allowed.

Dated at Tacoma, Washington, this 13th day of March, A. D. 1922.

EDWARD E. CUSHMAN,
Judge.

O. K.—WALTER A. MCCLURE,
For said Creditors.

[Indorsed]: Mar. 13, 1922. [29]

Memorandum Decision on Review.

Filed February 21, 1922.

McCLURE & McCLURE, GEO. N. WOODLEY,
Esq., for Carson, Pirie, Scott & Co., Claimant.

A. A. HULL, Esq., J. E. MURRAY, Esq., for
Claimant, Coffman-Dobson B. & T. Co., and
Bee-Nugget Pub. Co.,

NELSON R. ANDERSON, Esq., for Trustee.

CUSHMAN, D. J.—Little can be added to the full, fair, careful, and painstaking statement of the Referee in his certificate.

Under the facts and the evidence, whatever date is fixed upon as that on which solvency ended and insolvency intervened, there is no such knowledge or notice of that fact shown upon the part of the alleged preference creditors as the law requires to deprive them of that advantage which they may have obtained. In addition to the Referee's reasons, it is only deemed necessary to add that—during a period of drastic deflation, following a period of extraordinary inflation, when the [30] judgment and calculation of business men are liable to be unsettled and to want in fullness of vision and a complete grasp of the relative worth of the various items entering into the value of a going merchandise business, the knowledge and notice of insolvency should be shown with much greater clearness than it can be contended was done in the present case.

The Referee's ruling is approved. [31]

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Statement.

By Mr. ANDERSON.—We filed objections to the claim of Carson, Pirie, Scott & Co. on the ground that they had received a preference within the meaning of the bankruptcy act and also that they received a preference within the meaning of the State law. The evidence will show that this company was incorporated in the first part of 1917, and that along about November, 1920, the officers of the company realized that they could not conduct the business successfully decided to liquidate the concern, and they first thought they might find a purchaser, and they advertised for a purchaser, for the business as a going concern, conducting these negotiations through January, February, and March, but finding no one that would offer over 60 per cent for the business. The first of April they sent for a special sales agent to come to Chehalis and conduct a special sale. That was

done. This was in 1921. The evidence will show that the creditors, at least some of them, were advised of these facts, and that during the whole of 1921, the past due indebtedness was very large and kept increasing. The company was unable to pay its debts as they matured, sometimes running as long as six months before they could pay. With respect to Carson, Pirie, Scott & Co., the evidence will show that after the first of the year they refused to sell this concern at all, with the exception of a very small amount, of about \$566. The position of the Carson-Pirie-Scott Company will appear more clearly when it is remembered that this company was incorporated by two men who were salesmen for Carson, Pirie, Scott & Co., and in fact was known as the Carson-Pirie-Scott store. This continued until up to the first of the year, when Carson, Pirie, Scott [33] & Co. stopped selling and commenced liquidating its account. Upon that, being unable to get goods from Carson, Pirie, Scott & Co., they went to other creditors and took their goods in and as they liquidated them they paid off Carson, Pirie, Scott & Co's. account. On the first of January the indebtedness of the Carson, Pirie, Scott & Co. was \$6590. To-day it is \$2,900. Since the first of the year Carson, Pirie, Scott & Co. sold them \$566 worth of goods and collected in about \$4,254.

Now, with respect to the bank, Coffman-Dobson Bank & Trust Co., it will appear that the first of the year the bankrupt gave its notes to the bank; one note was payable 3 months after date, January 1,

for \$2,500; another one for \$1,000 and another for \$2,000; and on January 22d the bank loaned \$500 on a ten-day note, and that was shortly afterwards paid off. On March 4 the bank accepted another note for 7 days for \$300; that was shortly afterwards paid off. But speaking now of the three notes given on January 1, 1921,—the evidence will show that those notes were all paid off within thirty days of this bankruptcy. On April 5, a payment of \$500 was made; April 9, \$500; April 14, \$500; April 19, \$500; April 23, \$500 and April 27, \$500.

Mr. HULL.—If they were all paid off, on what do we base our claim?

Mr. ANDERSON.—It leaves the claim of the bank of \$1800 plus interest.

Mr. McCLURE.—I understand counsel's statement as to both of these claims is not entirely accurate as to the figures?

Mr. ANDERSON.—I am pretending to give absolutely accurate figures on both the Carson-Pirie-Scott Claim and the Coffman-Dobson Bank claim. Further in regard to the bank's claim, the evidence will show that all the money loaned during 1921 has been repaid 100 per cent. These payments that are objected to here are for credits extended during 1920. [34]

With the Bee-Nugget claim, it appears that they likewise have received 100 per cent on the dollar for all the credit extended during 1921, and payments made on that account have been, April 4, \$339.50, and April 25, \$234.50. In other words, it

is the contention of the trustees that these creditors have received 100 cents on the dollar for all credit extended during 1921,—in contrast with other creditors who have received in some cases from nothing varying up to 75 per cent; and in addition to that they received payments on their old claims, in the case of the Bee-Nugget being 20 per cent on its old indebtedness of 1920, and the Carson-Pirie-Scott Company received about 55 per cent on the old claim, and in the case of the bank, they received 67 per cent.

Mr. HULL.—You are not questioning the payment made for the 1921 credit?

Mr. ANDERSON.—We have not made any contention during 1921, that they received any preference. Understand the trustee's theory is this: If any creditors during the month of April for instance sold merchandise to this bankrupt and at the same time received his pay for it, this estate has not been depleted; but where, as in the cases objected to by the trustee, the credit has long since been extended and then a payment is made, that is a preference under the state law, the same as it is under the bankruptcy within the four months period. It is only where payments are made on existing indebtedness running back some time that we claim preference. With respect to the Royal Corset Claim, they have stipulated that any decision your Honor renders with respect to this case will apply to them, and the same is true as to the [35] Fleischner, Mayer & Co. claim,—or do they waive their preference altogether?

COUNSEL.—No, they said they would abide by the decision of the Court in these other cases; that is to say, if the Court held that our theory was correct they would abide by it without any further argument.

Mr. McCLURE.—That was stated to the trustee, —they put it in the form of a letter.

Thereupon the following witnesses were called to sustain the issues on behalf of the trustee. [36]

Abstract of Testimony.

Testimony of Charles L. LeSourd, for the Trustee.

CHAS. L. LeSOURD, a witness on behalf of the Trustee.

Direct Examination.

By Mr. ANDERSON.—I am Trust Officer of Dexter-Horton National Bank, Seattle. On March 15, 1919, the Bank was appointed administrator w. w. a. of the estate of Ed. M. O'Brien, deceased, one of the stockholders of the Elliott-O'Brien Company. That was the Bank's first connection with the Company.

Individually, but not as an officer of the Bank, I have had some connection with the Elliott-O'Brien Company during the past year.

Q. Was there a meeting held in Seattle in November, 1920, at which there was an officer of the Elliott-O'Brien Company present, who made certain suggestions with a view of liquidating the estate?

(OBJECTION on behalf of claimants "as not binding on any of the creditors" and because

(Testimony of Charles L. LeSourd.)

“counsel (for trustee) in his statement shows he is not going back further than the 1st of January, 1921, and I submit the proposed testimony is entirely immaterial and incompetent under the issues as framed by counsel’s opening statement.”

Objection overruled—and EXCEPTION allowed.)

(AGREEMENT BETWEEN COUNSEL that testimony taken at hearing is to be taken and considered with respect to all claims and that objections interposed by counsel for either of the claimants, are to apply to all of the claims.)

A. In the latter part of November or the first of December, 1920, Mr. Chas. H. O’Brien, brother of the deceased, Ed. O’Brien, and Mr. Elliott dropped into my office and had a talk concerning the store at Chehalis. Mr. O’Brien at that time was dissatisfied with the way things were going,—with the way the store had been conducted, and the present condition of the store—and spoke of closing it out, meaning, I believe, he wanted to sell it out as a going concern. (Tes., p. 8.)

Mr. Elliott at that time spoke of having several months good business ahead of him. It was just before Christmas-time when he expected to have considerable Christmas trade, and he stated that if the store did not sell previous to February, in his opinion, he should [37] reduce the stock to \$15,000. As I recall, the stock at that time was between \$25,000 and \$30,000. He (considered) he could reduce the stock by February, as I recall it, to about \$15,000 when it was considered that a

(Testimony of Charles L. LeSourd.)

better sale could be accomplished at that time; the estate of Ed. O'Brien, deceased, had been disbursed and Chas. H. O'Brien, who was present on this occasion, had received 25 shares of the Elliott-O'Brien Company.

I recall no plans made at this meeting about advertising the business for sale.

I never had any correspondence with Carson, Pirie, Scott & Co. direct, regarding the Elliott-O'Brien Company—have had correspondence with the attorney, Mr. Davis, personally.

The file of letters now shown me, marked for identification, Trustee's Exhibit "A," are original letters which I received and correct carbon copies of letters which I mailed, and are part of my correspondence file.

On April 22d, I had occasion to go to Chehalis in reference to the Elliott-O'Brien matters for the reason that Mr. Elliott had indicated a desire to leave the store, having arranged another occupation and being about to turn the business over to Hart. I was requested to come down and check up matters with them before the transfer was made. I do not know when Elliott made his arrangements to leave—it was a short time before that that I had heard it; he actually left between April 22d and the end of the month—cannot recall exact date.

I called at the Coffman-Dobson Bank—talked with Mr. Donohue, vice-president, about the affairs of the Elliott-O'Brien Co.—told him I had been informed that they had demanded \$1,000 a week on

(Testimony of Charles L. LeSourd.)

their indebtedness to them from the Elliott-O'Brien Co.—told Mr. Donohue that Hart was going to be in charge of the store and that it was Hart's intention to pay the Bank's claim, together with the other claims, as they could; but that the store was not taking in a great deal of money and that the Bank should not expect them to pay everything that they took in at the store, on the Bank's claim—that [38] they could not keep the store running in that way. That was about the extent of our conversation—talked with him only a few minutes—nothing said about the indebtedness of the bankrupt. Donohue said he had not personally been looking after the Elliott-O'Brien estate—did not seem to be very familiar with it.

I was told by Mr. Elliott that the store was advertised for sale during the first part of 1921—most of my information came from Mr. Hart or Mr. Elliott.

Cross-examination.

(By Mr. McCLURE.)

Dextor-Horton Trust & Savings Bank was executor with the will annexed of the estate of Ed. O'Brien—I handled the matter for the Bank, as an officer—Ed. O'Brien owned one-half of the capital stock of the company, 75 shares, par value \$100.00 per share—the remaining capital stock was owned by W. F. Elliott. The total capital was \$15,000 owned one-half by Ed. O'Brien's estate and one-half by Elliott.

On distribution of the estate, the 75 shares be-

(Testimony of Charles L. LeSourd.)

longing to Ed. O'Brien, deceased, were split three ways: 25 shares going to Ed. O'Brien's widow, Alice O'Brien, 25 shares to the brother, Chas. H. O'Brien of Chicago, and 25 shares to six nephews and nieces residing in Salt Lake. The Mr. O'Brien I mention in my testimony was this Mr. Chas. H. O'Brien who received 25 shares of the capital stock.

After the estate was disbursed (about February, 1920) the Bank ceased to have any connection with the matter—I heard nothing from the store from that time until the fall of 1921.

About the end of January (1921) Mr. C. H. O'Brien was leaving on a trip to the Bermuda Islands and sent me a power of attorney to represent him in any matters in connection with the store—I was representing him personally in this matter and no one else. Mr. O'Brien asked me to take up all such matters with Mr. C. P. Davis, his personal representative in Chicago, and accordingly, I wrote to Mr. Davis as the representative of Mr. C. H. O'Brien, the letters that counsel [39] has called to my attention (Trustee's Exhibit "A").

At the meeting in November, to which I have referred, Mr. C. H. O'Brien expressed himself to me as being dissatisfied because the merchandise stock had not been reduced largely—was being carried at too high an amount. He thought it should have been reduced in quantities, that they were carrying too much merchandise. That was the substance of his expression of dissatisfaction. Mr. Elliott, in that conversation, was quite optimistic—

(Testimony of Charles L. LeSourd.)

that if the business was not sold out, he would let it run for a few months more, and that he could reduce the stock very materially. Mr. O'Brien wanted the merchandise reduced because he wanted to reduce the indebtedness, also because he wanted to sell out the O'Brien interests in the business—to sell out and get the O'Brien interests reduced to cash. He wanted to reduce the stock in order that the store might be more easily a saleable proposition.

Q. Neither O'Brien nor Elliott had any idea in their minds from what they said that the Company was insolvent at that time?

A. Never mentioned it at that time.

In fact, Elliott said that they had two good months' business ahead of them and that he could raise a lot of money during those two months—should be able to reduce the stock of merchandise to about \$15,000 by February. He did not say anything as to what the indebtedness would be after he had reduced the stock to \$15,000.

I left Chehalis on April 22d—Mr. Hart was there then—had been there perhaps ten days or two weeks—at the instance of Mr. Chas. H. O'Brien—through me—for the purpose of assisting in reducing the stock, and taking the management of the store when Mr. Elliott left. Hart had been down there several times before, assisting Mr. Elliott when he put on sales for the purpose of reducing his stock. It is a difficult question to answer (whether the business was in good condi-

(Testimony of Charles L. LeSourd.)

tion when I went there April 22d)—the day I was there, Elliott and I went over the books and made a list of the indebtedness; [40] it was very high, totaling, I think, the sum of \$18,000; that presumably covered the entire indebtedness of the concern, including the Bank account (I cannot just recall whether it included the taxes).

Previous to this time, two or three prospective purchasers for the business had interviewed us, but only one really concrete proposition was made. That was from Mr. Worth. I cannot recall the time, but imagine that it was about a week or ten days previous to this; I cannot say whether Mr. Worth's offer would have paid all of the creditors in full if accepted by the corporation, because his offer was based on so much of the inventory and the amount of goods on hand. We were anxious to sell. Mr. Worth first offered, as I recall it, seventy per cent on the replacement value of the merchandise, fixtures thrown in for nothing; later he raised that offer to 80% and still later to 90%, but I did not know whether we should accept it at ninety cents or not and wired to Mr. Davis about it. I considered that the Worth offer, if accepted, would at least pay the debts, and possibly a little on the capital stock.

Up to this visit of April 22d I thought the capital stock had some value—not any large value—but I did think it might have some value.

Along the end of the year (1920) we considered the capital stock worth fifty cents on the dollar.

(Testimony of Charles L. LeSourd.)

It was about November or December, 1920, that Mr. O'Brien told me to sell (the capital stock) at 50 cents on the dollar if we could get an offer. Mr. Elliott in fact made an offer of 50 cents on the dollar about that time, but for some reason, the negotiations were not closed.

I made this trip on April 22d because Mr. Elliott had another position and wanted to turn it over to Mr. Hart. Hart had come down there at my suggestion, to take charge, and both of the men had requested me to come down at the time the transfer was to be made.

All along, during these negotiations with respect to the possible [41] sale of the store, there was quite a serious legal question as to who should execute the papers (to effect the transfer) especially should Mr. Elliott leave, because there were no properly elected officers to sign any document. There were (originally) just two stockholders, Mr. Ed. O'Brien and Mr. Elliott, who also were trustees, Mr. Ed. O'Brien being president and Mr. Elliott secretary-treasurer. After the decease of O'Brien, there was no president and now the only other officer and trustee (Mr. Elliott) was leaving. We attempted to correct that situation by having a stockholders' meeting on that day (April 22d), at which Mr. C. H. O'Brien was elected president and Mr. Hart, I believe, secretary-treasurer. Mr. C. H. O'Brien was in Europe at that time. I represented him at the meeting by my power of attorney. He never qualified.

(Testimony of Charles L. LeSourd.)

My object in going to Chehalis on April 22d, 1921, was to check over all things with Mr. Elliott and Mr. Hart before Elliott left—as far as I could on that one day. We went over the debts, made a list of them and then we discussed the proposition of taking an inventory. The store was closed the day I was there, Friday, preparatory to opening a new sale on Saturday—re-pricing some of the stock and preparing to open a sale on Saturday morning. They were quite busy, expected to be busy the next day; and it was suggested that on Sunday they would put on a crew and take inventory of the merchandise on hand. So I came back to Seattle and Mr. Elliott agreed to stay over to help take the inventory. He had planned to leave right away, but stayed over and the inventory was prepared. Mr. Hart took a day or two to price it and then came up to see me. I think it was about the first or second of May when he came up,—with a list of the stock on hand at the replacement values. He showed me the figures and that was the time we determined the store was insolvent.

Q. What date was that?

A. I think that was May 2d, perhaps May 1st; May 2d, I think; May 2d, probably.

Q. May 2d will be Monday.

A. That was the day—it was on Monday. That was the first knowledge [42] I ever had that the store was insolvent.

Elliott had left prior to that time—just what day I do not recall.

(Testimony of Charles L. LeSourd.)

Redirect Examination.

(By Mr. ANDERSON.)

On May 2d, I found, as to the condition of the business, that the stock of merchandise on hand at replacement value was a considerable amount smaller than the debts of the concern.

Q. On April 1, 1921, wasn't it a fact that many of the debts of this corporation were long since past due and the corporation was not paying its bills as its debts fell due?

Mr. McCLURE.—We object to that as leading.

The COURT.—If he knows he may answer. (Exception allowed.)

A. I know there were some obligations past due.

Q. Isn't it a fact that even going back beyond April 1st, even as early as March 19, that the greatest concern of the officers of this company and yourself, was that the company would go into the hands of a receiver? I can refresh your recollection by looking at Trustee's Exhibit "A," dated March 19.

Mr. McCLURE.—I object to that. Their feeling or concern in the matter would not be binding on the creditors; it is a question of fact as to the condition of the business.

The COURT.—You have to give him some leniency to arrive at the facts. Objection overruled and exception allowed. [43]

Mr. McCLURE.—We further object on the ground that counsel is cross-examining his own witness.

(Testimony of Charles L. LeSourd.)

The COURT.—Go ahead.

A. Why, I thought this: I knew that there were a number of little bills past due and the merchandise was not being liquidated as rapidly as we had hoped for. I was afraid some creditor becoming uneasy, would come in and ask for a receivership on the ground of his past due account. I did not know at that time that the store was insolvent; that is, I did not know that they had assets less than their liabilities; but they had a large stock of merchandise on hand and I had a fear, as the letters here I think will reveal, that it would not be turned into cash as rapidly as their debts matured.

It is a fact that the claim of Carson, Pirie, Scott & Co. filed in this bankruptcy was first sent to me to be given attention.

Recross-examination.

(By Mr. McCLURE.)

The term "replacement value" which I have used, was an expression used by Mr. Hart and myself in discussing the value of the stock, and I understand it is the cost of replacing that same stuff on the shelves, buying it new and placing it on the shelves. Not the original cost, not necessarily the selling price for it, but the market or cost of replacing it on the shelves as it was, including the freight, cartage, insurance and all those items.

The COURT.—That was a time when the merchants were all reducing inventories, wasn't it?

A. Very, very rapidly, all of them. Prices had been dropping in merchandise during the fall of

(Testimony of Charles L. LeSourd.)

1920 quite rapidly, and more rapidly in the spring. I could not say how much more rapidly in the spring than in the fall, because I am not familiar enough with the dry goods business to answer that.

This business was a going business up until it was turned over to the State Court Receiver. As to whether the business had a goodwill I only know this: I have friends and relatives who live in the town and they used to tell me that if they ever wanted anything [44] good, they went down to the Elliott-O'Brien store to get it. The goodwill must have been excellent; the business must have had some goodwill.

I do not know of any creditors whatever who were trying to enforce their claims by a legal procedure, or any who entertained a wish to do so.

So far as the Elliott and the O'Brien interests are concerned, it was the expectation, up to say the 2d of May, 1921, when Hart came to Seattle and interviewed me, that the business would be continued. So far as I know, neither Mr. O'Brien nor Mr. Elliott had any idea that the store would be closed at that time. So far as I know they expected that it would continue as a going concern. It was operated right up to the day of the appointment of the receiver.

It is largely correct that the sole reason, or the principal inducing reason for the reduction of the stock of merchandise, was first, to reduce to cash, as nearly as it might be, the Ed O'Brien capital stock investment; and second, to reduce the size

(Testimony of Charles L. LeSourd.)

of the business so that some purchaser might be found for the business as a going concern. Of course, we all recognize the fact that a business like that, carrying merchandise stock of from \$25,000 to \$30,000 and an indebtedness running up to \$15,000 or \$20,000, ~~is~~ always in danger. It is not good business, and we wanted to reduce the stock and reduce the indebtedness at the same time, and operate the same in a better financial position; and then it would not take so much cash to buy it.

Q. Then Mr. Elliott was perfectly willing to continue the business by himself, was he not, as you understood it from him?

A. He had been very anxious to buy the business.

Q. He was a man of limited means? A. Yes.

Q. And he could not purchase 25 or 30 thousand dollars, but he could purchase 10 or 15 thousand dollars of it? That was one of the reasons for reducing the stock of merchandise, wasn't it? Or perhaps you could find some other purchaser who could pay 15 thousand dollars, but who could not purchase the larger sized stock? [45]

A. That is very true. The number of persons to whom we could sell the store largely increased if you got it down to a ten or fifteen thousand dollar proposition.

Mr. Elliott was indebted at that time to Mr. Chas. H. O'Brien in the sum of \$4,500.00 and had all his stock collateralized.

Q. And when he talked about paying 50 cents on the dollar for more stock, it was also on the basis

(Testimony of Charles L. LeSourd.)

that he took the \$5,000 worth, that he owed the corporation for, was to be wiped out at the same time, wasn't it?

A. I believe that was a part of the proposition.

Q. So that he was not going to pay more than—

A. Fifty per cent.

Q. He was going to pay \$2,500 for stock worth \$7,500?

A. I have not figured that out. He was to pay 50 per cent provided the obligations of the corporation were eliminated.

Q. Fifty cents for the capital stock?

A. Fifty cents on the capital stock. [46]

Testimony of William F. Elliott, for the Trustee.

WILLIAM F. ELLIOTT, a witness on behalf of the Trustee.

Direct Examination.

(By Mr. ANDERSON.)

I was one of the original incorporators and secretary-treasurer and manager, of the Elliott-O'Brien Company, Mr. E. M. O'Brien was formerly its president; and, after his death, his brother, C. H. O'Brien, was president.

Prior to the incorporation of the company, both of the O'Briens and I had been in the employ of Carson, Pirie, Scott & Co. E. M. O'Brien was in the employ of Carson, Pirie, Scott & Company after the formation of this company in 1917, and C. H. O'Brien is still employed by them—has been, for possibly 30 years. I have been with them this

(Testimony of William F. Elliott.)

last time for about six months, since the first of May, and was with them for about ten years before the organization of this company.

I was with the Elliott-O'Brien Company during the whole time it was operating at Chehalis, from 1917 until late in April, 1921.

E. M. O'Brien died in December, 1918.

His brother, Ed. O'Brien, was not active in the business at Chehalis until about six months ago, about October, 1921. He didn't do anything right there, in Chehalis, he simply,—in a way he controlled all of my stock—he had nothing at all to do so far as the bankrupt's business was concerned. He did not come there (to Chehalis) in October—was not active—simply came to Chehalis every thirty days, possibly part of the day—his home was Chicago—would go through here—had nothing to do with Carson-Pirie-Scott's branch office in Seattle. He went to Bermuda about January, 1921—told me he was sending Mr. LeSourd a Power of Attorney and that I was to consult Mr. LeSourd in connection with the business.

Mr. C. H. O'Brien dictated the policy of the business during the [47] fall of 1920, while in Chicago, and for about a month or six weeks after coming here in October. He then went to California from here. I was then secretary of the company—resigned on April 22d, 1921—was succeeded by Mr. Hart, who had become connected with the bankrupt company sometime in November.

Hart's connection with the store came about in

(Testimony of William F. Elliott.)

this way: I had a big sale on. Mr. O'Brien thought I was worked a little too hard and felt I ought to have some one down there to assist me; and so he suggested that I have Mr. Hart come down and help me. Mr. Hart came down and was at Chehalis from November until the first of February, the first time. Then Mr. O'Brien wrote Hart that he did not see any reason why he should be there any longer, and to come back to Seattle. Mr. Hart next became connected with the company sometime in February, 1921. I was getting ready for another sale and wrote Hart that I would like to have him come down and help me again. He stayed until after I left.

Hart came the first time at Mr. O'Brien's request. The last time I asked him myself.

There were no arrangements made in November, 1920, about handling the indebtedness of the company, except that I had a sale on during November and we were supposed to put the pressure on a little stronger and see if we could not reduce the indebtedness by the first of January; and then of course we always expected to reduce stock quite a good deal in the January sales.

It is not unusual to put on a special sale during the fall months. Meir and Frank, the largest retail dealers, have had a sale on since a year ago last January without a stop.

I left Chehalis on April 25th—went to Seattle and saw the Carson-Pirie-Scott representative, then went on to Chicago, taking employment with Car-

(Testimony of William F. Elliott.)

son-Pirie-Scott & Co. I first arranged to go with them early in April, 1921—arranged by correspondence—asked for a position with the company. I first wrote asking for a [48] position in the latter part of March or early in April. At that time (on leaving Chehalis) I went to see one of the officers of the company in the State of Washington—

I sought a position with Carson-Pirie-Scott in March simply because Mr. O'Brien and I had a great many differences for four or five months; and I felt that, as he had control of the stock, I had nothing whatever to do in regard to the business. I nominally owned half of the stock. On the other hand, he had every bit of it as security for personal loan. I was really not connected with the business except as manager in name only, though I had been connected with it since its incorporation.

I had been advertising the business for sale in the "Seattle Times" and the "Oregonian" early in the year—am not just sure whether January was the month—1921. I got in touch with different men with a view to selling the store during February and March, 1921.

Q. You had come to the conclusion as early as 1920, that this business was a losing proposition, and the best thing to do was to liquidate for the benefit of creditors and for the stockholders?

A. No.

Q. What was the earliest date that the bankrupt concern decided to sell out and quit business?

(Testimony of William F. Elliott.)

Mr. McCLURE.—I object to that, nothing in the record to show that they did decide.

The COURT.—He may answer the question. Exception allowed.

A. I will say sometime during January. I might qualify that by saying I had nothing to do with the decision whatever, finally; that Mr. O'Brien simply decided. We had other arrangements on, he and myself personally; he absolutely ignored (these arrangements) and had taken it (the business) over himself—had planned to give up the company's affairs in Chehalis, that is one of the reasons why I felt [49] I could quit at any time. He had taken the policy of the business absolutely out of my hands.

Mr. O'Brien notified me of this decision in January, 1921. He wrote me that he was going away on an extended trip and was turning the notes I owed him over to Mr. LeSourd for collection. As I understood, he had instructed Mr. LeSourd to look to the closing of the business.

After January 1st, I exchanged a few letters with different prospective buyers for the store; they did not amount to anything except one from Mr. Bach. He wrote me in February. Mr. Mottman of Olympia wrote us after I got the letter from Mr. Bach, I think, and I also dealt with Mr. Worth of Albany who came up to see me in Chehalis in March, I think. Also I had a couple of answers to my advertisement but nothing came of the latter; I do not think I advertised the business in the Chehalis

(Testimony of William F. Elliott.)

papers—didn't endeavor to make a sale through any merchant—

Q. Did you advise Carson, Pirie, Scott & Co. of your decision to sell out in bulk?

A. I think I possibly wrote to Mr. Davis and told him about the store.

Mr. Davis is the attorney representing Carson, Pirie, Scott & Company in Chicago—has an office with them. I have no copies of those letters—and reply letters received from Carson, Pirie, Scott & Co.—I haven't any personally, though I might have some of the originals in my trunk in Spokane, some of the important letters I possibly kept—I have some of the correspondence in Spokane and will forward those letters to the Referee upon returning to Spokane—can do so within thirty days.

The bankrupt concern had a correspondence file at Chehalis in which they kept the letters they received. That file was there when I left, in a folder.

I did not talk with any representatives of Carson-Pirie-Scott [50] about the affairs of this company during 1921—not that I know of. When I left Chehalis I saw their representative in Seattle—about my new position, didn't talk to him about the affairs of the company.

Q. Was this representative at Chehalis at different times during the spring?

A. He came to see me regarding the position sometime during April; in passing through he stopped off.

I kept the books of the company.

(Testimony of William F. Elliott.)

I came here to this trial at the request of Mr. Woodley, representing Carson, Pirie, Scott & Co.

I kept the trial balance books shown me (marked Trustee's Exhibit "B" for identification).

Q. Referring to page 4 of the trial balance (book) will you tell the Court the amount of the past due indebtedness for January.

Mr. McCLURE.—The book speaks for itself; it does not need any interpretation.

The COURT.—He may explain. Exception allowed.

January 1st, merchandise indebtedness past due, \$3,970.68; merchandise indebtedness not due, \$7,-108.15.

On January 1st, 1921, I would say we owed the Bank \$5,500.00, that is in another book. That was on demand; I do not know whether that was past due or not. On December 31, 1920, we owed the Bank \$5,500.00; that indebtedness was incurred before 1918—it was carried for three years. Of course, we had a great deal more than that at different times in the Bank. On January 1st, we simply made out new notes; these were not renewal notes. Those others were on demand and we made out three ninety-day notes for \$2,500.00, \$2,000.00 and \$1,000.00.

Q. So that was not past due?

A. No, that was not past due.

Mr. HULL.—Except on demand. [51]

A. They never demanded it, except that they thought that we should make out a new note so we

(Testimony of William F. Elliott.)

simply made out the new notes and made them for ninety days, three notes, ninety days.

Our "past due" and "not due" merchandise indebtedness was:

1921.	Past Due.	Not Due.	Total.
January 1st	\$3,970.68	\$7,108.15	(11,078.83)
February 1st	3,446.14	9,291.31	12,727.53
March 1st	4,788.79	9,527.45	14,316.24
April 1st	8,693.19	3,923.42	12,616.61

That is as far as my book went (was kept); I left about May 1st, the date of the last entry would be April 1st.

On April 1st our indebtedness to the Bank was \$5,500.00. At that time our account was overdrawn at the bank \$309.99 overdrawn. This was really "kiting" a check. We had sent the checks back to New York and they had not come back yet; we were not really overdrawn. According to the statement, we possibly had \$1,000 in the bank, but we might have had \$1,300 in checks out, the Bank did not know we were overdrawn, of course. It did not appear on their books. I had put that down to bring my own cash balance up.

Our sales were as follows:

During January	\$6,026.99
During February	4,636.94
During March	4,417.19
During April	8,877.46

Q. These books show the correct condition of your books (business) so far as they go?

A. No, this "stock" is simply an estimate. We

(Testimony of William F. Elliott.)

took an inventory of it the first of January. Of course then the merchandise would show correctly. February 1st we made an estimate of the gross receipts and net profits. The same thing for March and April. That was an estimate of what we had on hand. [52]

Except for the "stock" account and the "net worth," the rest of the figures here are actual. We used an estimate to find our "net worth." The "sales" are correct. In estimating the "stock," I made a reduction of 30% or 25%—reduced it comparatively.

The book shows the amount of goods we bought each month, also the amount we sold each month.

Our purchases were:

January	\$2,580.16
February	3,274.15
March	4,478.35
April	249.84

As shown at pages 5 and 6 of the Trial Balance Book, our total expenses were:

January	\$2,396.78
February	1,548.49
March	1,583.84
April	2,806.29

(Trial Balance Book received in evidence, marked Trustee's Exhibit "B.")

Carson, Pirie, Scott & Company was our principal creditor during 1917 to 1920—

Q. What was the most you owed Carson, Pirie, Scott & Company during 1920?

(Testimony of William F. Elliott.)

A. I could tell by our books. I think about \$16,000.

Q. Can you refer to your books to show that?

A. It will have to be added up.

Mr. McCLURE.—I object to that as immaterial, any transaction in 1920.

Mr. ANDERSON.—I stated the trustee would show that up to the first of January this was known as the Carson-Pirie-Scott store, for the reason that Carson, Pirie, Scott & Company sold them the greater part of their account, that is merchandise. After January first, Carson-Pirie-Scott refused them credit, in fact; and then they began to buy from other creditors whose accounts are represented by the trustee. [53]

The COURT.—You may show that. EXCEPTION allowed.

WITNESS.—There are some records somewhere where I have written Mr. Davis calling for a statement showing the amount we owed; but otherwise my books do not show the amount I owed the large creditors. They show by the month, and I went through and picked Carson-Pirie-Scott Company's out of each month and added them together. About June, 1920, I think we owed them \$16,000.

(Statement of Carson, Pirie, Scott & Co.'s account, dated Chicago, 7-19-21, was stipulated by counsel to be a correct statement of the indebtedness, amount \$6,590.47, due it from the Elliott-O'Brien Company on January 1, 1921, and of the debits and credits from that date down to the time

(Testimony of William F. Elliott.)

the bankruptcy claim was filed—the final balance being \$2,962.18—was received in evidence and marked Trustee's Exhibit "C.")

I will explain the method in which I kept the Elliott-O'Brien Company's books: We started off with our invoices at two seasons of the year, spring and fall, indicating these seasons on our books by the letters "S" and "F." Spring started on February 1st and ended June 30th and fall started July 1st and ended January 31st. We did not take inventory until February 1st. So starting with the invoices that come in the first of January or say the first of February, they will be our first Spring invoices. We marked them "S" and indicate the year by letters—"A" for 1916, "B" for 1917, "C" for 1918, "D" for 1919, "E" for 1920, and "F" for 1921, this year being our sixth year in business; as the invoices came in I would mark it (to show the season)—for instance, this one (marked "S" "F") was spring 1921—and then I would enter the amounts in the invoice book (marked Trustee's Exhibit "F"), and afterwards in our distribution book. I might illustrate by showing the entries in the invoice book, and then take it (the entries) from that (the invoice book) into my other book (the distribution book). [54]

Here is an invoice we received the 29th of January. I received it in February, it was spring merchandise. I entered the month and date of the invoice (in the invoice book). (There were three different departments,—dry-goods, indicated by

(Testimony of William F. Elliott.)

“D,” Clothing indicated by “C,” etc.) I then entered the amount of cash discount, 2% in this instance, then the date when due, then the date when paid, then the date when received, then the amount paid, also entering any credits. The amount paid with the credits and the discount would make the total (entered) here; that would be the balance.

When the invoice came in I first checked it over and then put down on the foot of the invoice the department and when it was due and also the date when it (the goods) was received.

Then at the end of the month I would simply take a statement of the total amount I had received.

Now, I can go back further—when we made a check for my department “D” that was entered; where it was due in March, for instance, I entered it there, the date it was due in March, and so on, and I put the number of the invoice here, and whether it was net, or 2%, or something else.

At the end of every month, then, I would balance my book, take off my totals, and transfer them over here into the grand total (illustrating). Here is January 31st: Now, I would come back here (indicating) and find out what is past due. These were all past due (indicating). I would pay them. When I did pay them I would draw a line through them; for instance, here is one on regular terms, 2% ten days, sixty extra; that means that at the end of 70 days I can take this 2% discount.

Carson, Pirie, Scott & Company, Fleischner, Mayer & Co. Marshall-Field and a lot of other

(Testimony of William F. Elliott.)

wholesale houses would give you 60 days in addition to this 60. They not only give you 10 days, they give you 60 and another 60, making 120 days. That invoice is net due at that time. Most of my invoices were delivered, I would say, last [55] October or November, and every discount was taken, including Fleischner-Mayer, Western Dry Goods and every other concern (except Carson, Pirie, Scott & Company). I paid them when due and took the discounts. With Carson, Pirie, Scott & Co.'s invoices, instead of taking the discount at the end of 70 days, I would make it (i. e., treated them as) net at the end of 120 days. If they shipped in January I had until April to pay.

So that the Carson-Pirie-Scott account here (i. e., referring to the statements, afterwards introduced as Trustee's Exhibit "D") shows that I am past due on the amount then due. There is no discount on them. They are supposed to be paid on that date. On these others (i. e., referring to invoices from other concerns) you will see a discount on nearly every one of them.

I cannot say that I paid the invoices at the end of 120 days. If I could possibly do so I would, but the trouble is that we could not do it. I would take all of my other discounts and the Carson-Pirie-Scott Company would have to come in when we could get it, which was usually when the others were all paid.

We bought a lot of merchandise from Carson, Pirie, Scott & Co. and it did not make any difference

(Testimony of William F. Elliott.)

with them. They wanted their bills paid—did not care for the 120 days—wanted us to pay in 70 days, their regular terms. Their invoices called for that, but we were entitled to 120 days.

We purchased approximately 75% of our dry-goods from Carson, Pirie, Scott & Co. (a bunch of statements rendered by Carson-Pirie, commencing September 8, 1920, and going down to April 4, 1921 (Test., page 47) were received in evidence, marked Trustee's Exhibit "D"). . . .

The pencil notations on these invoices (referring to Trustee's Exhibit "D") are all mine. The notations merely refer to the time when certain of the invoices were paid. I made a note of this on the invoices as well as on my check-book and checked off the invoices [56] according to the invoice book. There were at least three entries. This (i. e., the pencil notations) is not official at all, I simply made a little memorandum on her (i. e., on the invoices).

Carson, Pirie, Scott & Company charged me no interest until I sent my check in with the invoices; if interest was due they would immediately return it (i. e., the invoice) and charge me interest for the overtime up to the time they got my check. The interest was figured from the expiration of the 120 days. If I paid at the end of 150 days, I would be charged with 30 days' interest.

These money items have all been summarized and written into my trial balance, showing merchandise received, past due, etc. Everything is in

(Testimony of William F. Elliott.)

the trial balance except the bank account, which I kept in the ledger account.

I note from Trustee's Exhibit "C" that Carson, Pirie, Scott & Co. sold us \$560.50 worth of merchandise on January 1st; they did not refuse us credit until after January 1st. It was some time in February when they refused to ship us any more merchandise until we paid our past due bills. We owed them not only 120 days, but we owed them back for about 240 days—six months back—and they wanted us to clear up our past due indebtedness before they extended us any more credit.

The COURT.—They wanted to get back to the 120 days.

A. I think it was February. We wanted to buy our spring merchandise and they refused to ship it to us unless we would pay more on our past due bills. Of course, they simply felt we had always been taking our discounts with other firms and they wanted to be treated the same as the other firms.

Q. Referring to the statement dated 12-3-20 in Trustee's Exhibit "D," you have been charged here 253 days' interest?

A. That was the average time, yes. [57]

Q. And that is 253 days, plus 120 days from the date of purchase? A. Oh, yes.

Q. Which would make over a year's time?

A. Yes, some of these bills were really a year past due—at least eight months past due, making a year's time.

The matter of our account with the Carson, Pirie,

(Testimony of William F. Elliott.)

Scott & Company was brought up in a conversation with Mr. O'Brien when he was here in November, 1920—to the effect that we ought to simply wipe our past due indebtedness off—that Carson, Pirie, Scott & Co. wanted to be treated the same as any other wholesalers—that while we were taking discounts with other concerns, we were letting them go and not paying them at all—not paying them net even—that they did not like that very well.

Mr. O'Brien was not then in the field for Carson, Pirie, Scott & Co. in reference to their Western accounts—had nothing to do with that whatever. At that time he was not working for Carson, Pirie, Scott & Co. He had been pensioned for a year and a half. He had nothing to do with Carson, Pirie, Scott & Company whatever—not for two years. He is not working at all, simply out enjoying himself. He has been with the Carson, Pirie, Scott & Company for thirty years and he has been pensioned.

I did not take up with Mr. O'Brien the matter of getting further goods from Carson, Pirie, Scott & Co. I might have written him simply, or he may have written me simply, that Carson, Pirie, Scott & Company would not ship us any more goods—in November and December. This was not in November. We got goods after that. It was really in January or February. I do not think Mr. O'Brien took this matter up with Carson, Pirie, Scott & Co. He took it up with me.

He said I simply ought to pay the indebtedness

(Testimony of William F. Elliott.)

and not buy any more goods, simply have our sale and cut our merchandise down and then we would be in position to buy more goods, but not to buy any more from Carson, Pirie, Scott & Company until we had paid up.

Q. Didn't you tell me when you were in Seattle about a month or so [58] ago, you *were ceased* buying from Carson, Pirie, Scott & Co. and were going out and buying from other creditors?

Mr. McCLURE.—He is trying to impeach his own witness and not laying the foundation; but it is not proper anyway because he is his own witness.

The COURT.—You may ask about any conversation you had with him. He was an officer of the company.

A. Mr. O'Brien never said anything regarding that at all; he said not to buy goods anywhere; he wanted us to reduce our stock down and pay our bills, particularly the past due bills which would come first.

We conducted special sales in 1921, commencing about January 1st—kept them going during February, March and April, making the same effort in April that we did in January and even in December—store covered with red signs advertising special sales during these months—town filled with posters—windows marked with cards—brought up a man from Portland to put on a special sale for us in April—filled the town with special advertising for the sale. The man from Portland simply stirred

(Testimony of William F. Elliott.)

things up a little bit. We had been running for three or four months and we thought it was a good idea to get some new blood in. He got out 7,000 circulars—mailed some—covered Centralia and Chehalis with circulars by boys, gave special inducements on merchandise to get the people to buy. He really did the same things we had done before, only we had a new man to do it.

Our notes to the Bank fell due on April 1st in the amount of \$5,500.00 and we had \$8,693.19 of past due merchandise indebtedness on April 1st, at which time we were overdrawn \$309.09 at the Bank according to our records, though the Bank's records did not show that. We had lots of checks out at that time, it would take them ten days to go to New York and back; and we were then, what is in banking terms, "kiting" checks.

Q. But these amounts which we have referred to here as being past due and not due, and indebtedness to the bank, were all over and above [59] anything that might be represented by checks outstanding?

Mr. McCLURE.—I object to the counsel testifying; let the witness testify.

Q. What are the facts?

The COURT.—He may answer the question.

A. Well, as I say, if the bill was paid, of course it would show in there, of course I would have to balance my books and then take our balance. The total amount we owed here would be included in that.

In reality if all of the outstanding checks had

(Testimony of William F. Elliott.)

come back on April 1st, we would not have had any money in the bank on April 1st to meet our past due indebtedness represented by the sum of \$8693.19.

It was right around that date, April 1st, that I wrote Carson, Pirie, Scott & Co. asking for a position with them; it might have been the last week in March or the first week in April; I planned to go with Carson, Pirie, Scott & Co. at that time.

Besides our merchandise on hand, we had fixtures, which represented about \$4,000.00 and our accounts of about \$1,000.00 to \$1500.00 as resources out of which to meet the obligations that had fallen due.

When our notes fell due at the Bank, I did not sign renewals. They called me over there and said I ought to do something about those notes—they merely stated that I had been paying other concerns, taking discounts, and they thought that we should treat them in the same way. We had been running that \$5,500.00 account for three years, ever since we opened up. We had paid all other accounts and not paid them one cent, which was very true, and I promised that at that time that we would do what I could for them. I cannot say that they asked me for a statement of my indebtedness—I do not think they did—do not remember of telling them what our indebtedness was on April 1st. I simply told them I felt we had not been treating them right and would do the very best I could for them.

(Testimony of William F. Elliott.)

Q. What did they demand of you in the way of payment? [60]

A. Well, they simply stated that they had ought to get at least—I cannot remember now; might have been a thousand dollars a week. Of course that looked easy, in a way, because we were going to have a big sale and easy to meet a thousand dollars a week. I thought that was very lenient, personally.

The results of this sale, according to the sales-book, were:

First two days	\$1,401.76
The next week	1,764.95
The next week	1,964.95
The next week	2,718.68
Last three days	1,119.62

The last item is not my figures—presume it is correct—appears to be (entered) April 27—I left on April 27th, Wednesday night—left the sales so that they could be entered—that winds up the book. The total sales for that month (April) were \$8,968.99, and expenses up to April 26th were \$2,896.29, leaving \$6,071.17 for disbursements. I cannot tell to whom that money was paid, without referring to my check-book stubs or the cancelled checks (These were not available at the hearing)—can tell how much paid out for merchandise, but not to whom, unless I check up my bank-book.

The COURT.—This sale you were running in April, were you running off new goods, or old goods?

(Testimony of William F. Elliott.)

A. Running off both—early in the season—had a lot of domestics, good almost any time, some spring goods, and some spring goods carried over from the season before. The Summer season had not started at all; it was April, and quite rainy.

Q. Were you selling at a loss, actual loss for each sale?

A. A fairly good profit on some of the goods—sold the new goods at a profit—made a profit on the oldest stuff, on what we took it in at—lots of merchandise we sloughed off—pretty hard to tell how the April business came out, because we hadn't taken an inventory since January first, leaving four months in there. [61]

Mr. ANDERSON.—So that it may go in the record, here: Trustee's Exhibit "C" shows that Carson, Pirie, Scott & Co. were paid \$1,598.13 during April.

I paid off our \$2,500.00 note at the bank in April—not sure whether I paid the \$1,000.00 note to the bank, or whether Hart did, after I left—think entries were made in here, telling all that.

Mr. ANDERSON.—The proof of claim in bankruptcy shows that on May 5th the balance in the bank, \$143.08, was applied on that \$1,000.00 note, the note then being past due.

As to bank making demand upon me for payment, after April first—as I stated, they called me over and stated they ought to receive some payments on these notes. I told them we would do the very best we could, we were getting ready

(Testimony of William F. Elliott.)

for another sale and I thought they were entitled to some payments.

Q. Did the bank state to you that they must be paid at the rate of \$1,000.00 a week?

Mr. HULL.—I object to that; that is incompetent.

The COURT.—He may answer; exception allowed.

A. They simply stated they would like me to pay at the rate of \$1000.00.

I was not at all apprehensive as early as April eighth that some creditors would step in and close us up—do not know anything about Hart's idea; but I did not feel that way at all myself.

I was there as manager for Mr. O'Brien, in a way—but had no interest, as I have stated, after Mr. O'Brien took the business (policy) out of my hands—I held \$7,500 of stock, not yet paid for—up as collateral.

As to basis of taking inventory on January 1, 1921:—as near as I could at market value—went through everything—were very careful in taking our inventory—(had) made an estimate—the inventory (when taken) ran 25 to 27 hundred dollars over my estimate—so sat down and took the inventory sheets and reduced all the different things and took another \$2,500.00 off the inventory, because I was satisfied that it would show our net worth was \$14,500.00 and I could not afford [62] to do that—so wrote off that amount from the original invoice sheets when I went through them page by page, making deductions on different

(Testimony of William F. Elliott.)

things. So that, when completed, the inventory was really placed at the market value. Had had so many sales that our merchandise was in very good shape—the old stuff had been gotten rid of—I had been keeping my stock up—and it was a going concern—the stock was “right up to the minute.”

I took the inventory on April 23d on exactly the same basis as before, only did not go over it again and mark it down but took it at what I thought was the market price. Our numerous sales had cleaned up the high price goods, and our spring merchandise was worth what we paid for it.

Our indebtedness for merchandise, from November, 1920, to the last of April, 1921, as shown by this book, was:

Nov. 30th	\$16,069.95
Dec. 31st	12,958.01
Jan. 31st	11,078.83
Feb. 28th	12,727.53
Mar. 31st	14,316.24
April 26th	12,616.61

There might be a few changes in the last item, April 26th, after I left; Mr. Hart paid a few bills after I left. That reduced our indebtedness from \$16,000 down to \$12,000.

Q. On December 31, you owed for merchandise \$12,958; and on April 26th you owed \$12,616, a difference of \$300?

A. Wait a minute. April, \$12,616.

Q. Yes.

Q. On December 30?

(Testimony of William F. Elliott.)

A. December 30th, merchandise \$12,958.

Oh, that is merchandise not due, only merchandise not due; that is not the total.

Q. What is the total?

A. \$16,240.92, on December 31st.

The paper now handed me—I would say that is a correct copy (Test., p. 69). [63]

Officially we always took inventory on February first; but this last year we took it in December.

According to our statement dated December 31, 1920, our net worth was \$14,230. I would say that we lost \$12,000 between January 1st and April 26th. At the end, it simply showed that we got our cost out of the merchandise, and that we had lost what it cost us to do business for that four months, which was \$10,000 to \$11,000. . . . In April it ran up. We had an outside man, and while we increased our sales, it cost a lot of money to do it.

Mr. ANDERSON.—That is all.

Cross-examination.

(By Mr. McCLURE.)

This corporation had a capital stock of \$15,000, of which Ed. O'Brien and I each owned half—75 shares each. Both of us paid cash for the stock. I put in \$3,000 of my own money and \$4,500 which I borrowed from the O'Briens.

I conducted the business; neither of the O'Briens took any active part in it.

I paid 8% interest on these loans—received a salary of \$150 a month originally, then \$200 and \$250 for the last six months. Had to pay interest

(Testimony of William F. Elliott.)

and living expenses out of my salary.

That is the explanation of the difficulties that arose between Charlie O'Brien and myself after Ed's death. Charles O'Brien was anxious to get out his own money, and that of the Ed. O'Brien estate. He thought we had too big a stock—was wanting me to pay the debts promptly, and cash in his stock investment. I had always figured that I could possibly take his interest over some time. Of course I wished to do that.

That was what we were talking about in November, 1920, when we met, in Seattle, with Mr. LeSourd. I made the proposition then—also in the Washington Hotel the next day. He simply stated that he [64] would cancel the notes I owed him—of course, he had the E. M. O'Brien notes as well. I owed the \$4,500.00—he would cancel those. There happened to be a gentleman present who was out here looking after some special sales for Carson-Pirie-Scott, and Mr. O'Brien had him up there at the hotel. We went over the matter very carefully. Mr. O'Brien agreed he would sign an agreement to cancel those notes. I figured that I would pay him \$140 a month, or 8% interest for three years, and buy their interest in the business in three years, he to cancel my indebtedness to him. I would then have my own indebtedness to him paid off. I figured I could buy their interest in the business at any price I wished. They wanted to get out of it.

At that time we owed Carson-Pirie-Scott quite a lot of money.

(Testimony of William F. Elliott.)

Q. C. H. O'Brien was not interviewed about the Carson-Pirie-Scott indebtedness in November?

A. Not particularly. He mentioned that with the other indebtedness; the thing was to get the indebtedness paid off. Of course the Carson-Pirie-Scott indebtedness was the largest part of it, and was long past due. Nothing else was past due. We did not owe a dollar (of past-due indebtedness except to Carson, Pirie, Scott & Co.) Our statement will show that in November, December and January there was nothing else past due; everything was up in shape. Everything was paid in January and everything was paid in February and we did not owe anybody. Nobody was wanting their money. Carson-Pirie-Scott did not have to have that money; and we did not have to pay them. We took advantage of all our discounts that came along, except the Carson-Pirie-Scott Company.

Q. And how did that happen to be in that condition?

A. We always had a standing account with them.

Q. They always had a substantial claim against the Elliott-O'Brien Company?

A. Oh, yes; they always had a big claim,—a substantial account with them ever since we began business—which had been past due.

Q. There was nothing unusual about that past due claim then? [65]

A. Not after the first six months we were in business.

(Testimony of William F. Elliott.)

Q. In your other debts, except the bank, business, you kept up?

A. Absolutely. Of course I might make an exception, in those last months, January, February and March, we could not take care of our indebtedness, as our books will show, and then we owed two other accounts besides Carson-Pirie-Scott, that is, Fleischner Mayer and Western Dry Goods Company, but nobody else. That was in March.

Q. Those were current accounts?

A. Not during March.

I would not say that those accounts were for goods purchased in 1921. It would be possible some were purchased in December.

Q. What did their claims amount to?

A. Well, the total past-due in March was \$3,000—the total among the three of them—

Mr. ANDERSON.—I can tell you what it was; the Western Dry Goods was \$904.66.

WITNESS.—That was due with discount. When the Western Dry Goods Company accounts fell due, we took our discounts until in March, as the statement shows here. That was the first month we let the Western Dry Goods Company go past due, also the first time we let Fleischner-Mayer Company go past due. That was the March statement. There were three concerns then, we owed in March.

Mr. Beamer, the representative of the Western Dry Goods Company came down to see us in March, or maybe early in April, sometime in there—came

(Testimony of William F. Elliott.)

in and wanted to know how we were getting along. He and Mr. Hart and myself talked the matter over. He wanted to know how we were coming out. I said, "Look at the merchandise we have. We have not taken an inventory since the first of the year; but I think we are running even. I think we are coming out even"—I meant that I figured that we really were making enough profit to pay our expenses. It proved afterwards that we did not do it, but I figured we were doing it. And he said, "Well, these bills were past due in March, when are [66] you going to take care of the account?" I said, "We will put on a sale in April and I think we will take care of everybody."

It appears that was satisfactory to Mr. Beamer; he made no objections to it—none at all—expressed his satisfaction.

Explaining the reason for my seeking a new position with Carson, Pirie, Scott & Co.;—I simply felt this way: I really had it up with Mr. LeSourd last November whether I should look for another position. He said, "No, you ought to stay. Mr. O'Brien has treated you nicely, you ought to stay with him," and so at last in March—this position was open the first of January—but along toward the latter part of March or the first of April, Mr. Hart had been there and I thought, "Well, I am married, I haven't got a cent, this position is open, it has good possibilities,"—that had been my firm before and I liked them and they seemed to be interested in me and they said they would not do

(Testimony of William F. Elliott.)

anything unless I had the consent of Mr. O'Brien to leave. They would not take Mr. LeSourd's word, but they wrote to Mr. O'Brien to see if he was willing that I should leave—and finally in the latter part of April I left and took the position, with Mr. LeSourd's consent.

I abandoned the idea of acquiring the Elliott-O'Brien business and operating it myself sometime during January when Mr. O'Brien wrote me he was sending my notes to Mr. LeSourd for collection and told me that I should pay them by the month or any way I could; that he was leaving on an extended trip;—I simply felt then there was nothing more to do—that Mr. O'Brien had repudiated his promises to me and I was out of it—his promise to permit me to pay off my indebtedness to him in three years. I felt he had taken it out of my hands and I resented it.

At no time, up to the time I left in April, 1921, was any creditor of the Elliott-O'Brien Company seeking to enforce its claim by law.

Q. What about the goodwill of this concern?

A. Well, of course it might be possible that it might appear to me [67] worth a little more than to anybody else; but I could have fifty witnesses from Chehalis come up here and state what kind of a store it is; that it was the best store in town. We had the highest class everything and we had the best line of business—a good location and I had felt that Mr. O'Brien was taking the wrong time to try to sell out. They were trying to

(Testimony of William F. Elliott.)

get one hundred cents on the dollar. In negotiating with Mr. Worth, Mr. LeSourd held out for one hundred cents on the dollar for the stock, including the goodwill, and the deal did not go through because he wanted the one hundred cents, I believe it was absolutely worth one hundred cents on the dollar at that time.

Q. In fact you considered the stock was worth par?

A. Yes, for our merchandise stock was worth \$14,000.

The bottom had simply fallen out of business in January and during the spring of 1921, not only in Chehalis but everywhere. Values were down and there was not any business. We put in as much advertising in January as we did in December and the sales will show,—our sales in January were approximately \$6,000, while in December they were a little over \$16,000. We had put forth the same effort in January as we did in December. There was absolutely no business. That slump continued and business was very quiet when I left. Of course our merchandise was really receding every month.

Q. Your suggestion of a payment of \$1,000 per week was rather the suggestion which the bank made to you, than that you made to the bank, wasn't it, to pay \$1,000 a week?

A. I did not think there was any question about it. I thought a \$1,000 would be very easy. I thought we ought to get \$500 or \$600 a day. I

(Testimony of William F. Elliott.)

think Mr. Hart and I agreed that we ought to get \$500 a day out of it—the bank was very friendly—no desire to embarrass us at any time, nor at all—I thought \$1,000 a week was very lenient—two days of our sales a week—\$500 a day, or \$1,000 for two days.

This special salesman from Portland made no guarantee as to what [68] he could accomplish, but figured on selling at least \$15,000 in April with the stock we had. We had done \$16,000 in December and he figured he could do at least \$15,000 during April.

Q. What was the condition of the stock at that time with respect to lines being broken?

A. The first of April the stock was absolutely perfect.

Q. In good condition?

A. Absolutely filled in, there was not a hole in the place. It had gone down gradually and we kept filling in.

The explanation of the failure of the April sale to meet expectations is that the public's ability to absorb merchandise had been exhausted. They could not take any more—also the weather was against us—rain all during April, every day.

(The two books previously identified and used by the witness in his testimony were received in evidence, viz: Invoice record as Trustee's Exhibit "F"; Ledger as Trustee's Exhibit "E.")

(Testimony of William F. Elliott.)

Cross-examination.

(By Mr. HULL.)

I was contemplating buying the Elliott-O'Brien store shortly before I left, and this last fall.

Q. You testified a minute ago it was in January. Didn't you also negotiate during the months of March and April, weren't you planning on it?

A. Yes, I had been planning on it; I had written Mr. O'Brien a couple of letters offering to buy the store at a certain price and we could not agree. He wanted cash and I wanted time. (Admitted by counsel that the bank loaned the Elliott-O'Brien Company \$500 in January.)

Q. And in March they loaned you additional money?

A. January 13th they let me have \$500 and I paid that off and on the 22d I got another \$500.

Q. And in March?

A. March \$300.

Q. So that they loaned you some money after the first of March? [69]

A. Yes.

Q. Did the bank intimate anything to you about their knowledge of trouble between you and Charles O'Brien?

A. Oh, I had that matter up with them once or twice at different times and they possibly knew we had a little trouble personally.

Redirect Examination.

(By Mr. ANDERSON.)

I think I told the bank I was going East, at the

(Testimony of William F. Elliott.)

time I got the position, about the first of April—wouldn't be sure—do not think I got it until April 20th, something like that—didn't get the position the first week in April, as I remember.

Q. What in your opinion is the goodwill of the business that has lost \$12,000 in the last four months?

A. Well, I would say that while we lost money, that did not affect the goodwill of the business. We had been four years and a half there; and four months losing money did not affect the goodwill; in fact, during that four months many people had come to the store who had not been there before, and they would continue to come.

Q. Now under the circumstances in this case in the demoralized condition of the business at Chehalis, would you say that any business had a goodwill value?

A. I would say that any business that had been successful.

Q. Take this business you were conducting in Chehalis in the spring of 1921, making various efforts to sell out and find a buyer, and having had the experience you had there with buyers, would you say that the business had any goodwill?

A. I do not think whether we had many buyers or not would affect the goodwill, because we chose a bad time to look for buyers. The goodwill could not be affected adversely by the sales we had in the four months. The more we did to get people to that store the better it would be for our successor.

(Testimony of William F. Elliott.)

I expect I notified the Bank, as soon as I found out I was going to leave. The Bank is across the street—I do not remember—no I did not make any special trip over there to tell them, that I remember of—went to the bank every day, but had nothing to do with Mr. Coffman—was simply making my deposits with the teller—didn't tell him anything, of course.

It is not a fact that the bank took a determined stand and told me I had to cancel our indebtedness at the rate of \$1,000 a week.

Q. Refresh your recollection by reading your letter dated March 28th to Mr. LeSourd and tell us when you received your position or offer of a position with Carson, Pirie, Scott & Company.

A. This was not the acceptance of the position. They wrote me they would not accept until they got into communication with Mr. O'Brien.

Q. Didn't they send you a telegram on March 28th making you an offer of the position?

A. Yes, but I think everything was based on Mr. O'Brien.

I could not tell when I first knew that I was going with Carson-Pirie-Scott, until I could see the letter—we exchanged quite a few letters before the thing was finally settled—would say around the 15th of April. (The letters, originals and copies, previously identified by the witness LeSourd were received in evidence and marked Trustee's Exhibit "A.")

(Witness excused.) [71]

Testimony of D. G. Abel, for the Trustee.

D. G. ABEL, a witness on behalf of the trustee.

Direct Examination.

(By Mr. ANDERSON.)

I acted as attorney for the bankrupt prior to the bankruptcy—practice law at Chehalis—the application for a receiver in the State Court for Lewis County was made by the Bee-Nuggett Publishing Company on April 7th, 1921—we filed our answers the same day and the State Court appointed the receiver, George R. Walker on May 7th, who immediately qualified.

Prior to this application for a receiver, I went to Seattle, on the 3d day of May, I think—received a letter from Mr. LeSourd on that date and immediately went to Seattle and took the matter up with the creditors—told them that Mr. Elliott had gone, that Mr. Hart was alone in charge and did not want to remain, that he had no interest in the Company, that the sales at that time, during Monday and Tuesday, of that week, had fallen off considerably and that unless action was taken at once there would be a further loss.

When Mr. Hart came down to Chehalis the second time he was elected as one of the officers—I was not at that meeting—was out of town—think Mr. LeSourd was down there—think it was contemplated that Mr. Elliott would leave and Mr. Hart would stay in charge as long as necessary—the first information I had of that meeting was a letter re-

(Testimony of D. G. Abel.)

ceived from Mr. LeSourd, dated probably the first day of May.

Q. Can you tell from memory when it was that Mr. Elliott made his connections with the Carson-Pirie-Scott Company, how long before this meeting of February 23d was held?

A. The first talk I had with Mr. Elliott was within two days after I received a letter from Mr. LeSourd, dated April 8th.

That conversation was in part about the claims of Mr. O'Brien against Mr. Elliott on his notes—there was no conversation about the Company, about the corporation going into bankruptcy—would not say [72] positively whether there was any conversation about Elliott's going East—think he spoke about looking for a job and going some place where he could make some money and get along.

(Copies of files in the case of Bee-Nuggett Publishing Co. vs. Elliott-O'Brien Co. in the case in the Superior Court of Lewis County were received in evidence and marked Trustee's Exhibit "G.")

Cross-examination.

(By Mr. HULL.)

I interviewed Mr. Elliott at the instance of Mr. LeSourd. LeSourd retained me to represent the O'Brien interests. That was the only interest I represented at that time—did not represent the bankrupt until last April anyway—at the instance of Mr. LeSourd and Mr. Hart, Mr. Hart principally. Mr. Hart brought a letter from Mr. LeSourd. At that first meeting when I made the trip

(Testimony of D. G. Abel.)

to Seattle I considered that I was representing the corporation, at least I was representing the stockholders of the corporation at that time—not Mr. Elliott. Mr. Elliott at that time considered he was out—his stock was in escrow—this was the first of May.

(Witness excused.) [73]

Testimony of George R. Walker, for the Trustee.

GEORGE R. WALKER, a witness on behalf of the trustee.

Direct Examination.

(By Mr. ANDERSON.)

I reside at Chehalis—was appointed receiver by the Superior Court of Lewis County on May 7th, 1921—Mr. Hart made an inventory of the assets under my supervision—haven't that inventory with me—suppose it was turned over with all the other books and papers.

As to my experience in the mercantile business—have been in the retail mercantile business for a good many years—have been assessing merchandise stores in Lewis County for a number of years, which gives me quite an inside knowledge of merchandising.

Q. What, according to your opinion, was this stock of merchandise and fixtures worth at market prices, as of the time you took it in May, 1921?

A. Well, as I remember, the invoices for the stock and fixtures amounted to \$16,000, approximately—the price or market value of the mer-

(Testimony of George R. Walker.)

chandise would be in the neighborhood of from 25% to 33 $\frac{1}{3}$ % less than what the invoice would show.

As to the condition of this merchandise:—Most of the stable articles like sheeting, gingham and such as that were all gone—a good many broken lines—a good deal of winter ladies' underwear which there wasn't any sale for a good many months—nearly every department badly broken up as far as lines were concerned—Could see the effect of inexperienced sales people handling it—articles in boxes where they were not supposed to be—more or less articles damaged by want of care—kid gloves damaged on account of being tried on, ripped and broken and such as that. That condition did prevail throughout the stock to a certain extent.

The merchandise was clean—nothing that you would call really old merchandise on hand, except that there was some merchandise not suitable for that season of the year, quite a good deal of it.
[74]

Cross-examination.

(By Mr. McCLURE.)

Mr. Hart took the inventory under my direction, I told him to take what he considered a fair inventory both for the creditors and for ourselves—thought it should be cut down 25% simply because merchandise of all kinds was dropping very fast and there was a good deal of old merchandise that had been bought at a high price—could not tell the

(Testimony of George R. Walker.)

extent of this damage by the salespeople because I did not go through the whole of the stock—it was nothing unusual—what you could expect in a sale such as Mr. Elliott had been conducting.

I think Mr. Hart deducted 25% off the merchandise in taking the inventory, off the invoice.

Q. And you think it could have been still further reduced 25%?

A. Well, I think that was little enough.

The concern had a goodwill—of value—a very good goodwill—it stood well—a great many people traded there.

Cross-examination.

(By Mr. HULL.)

The peculiar locality of the store was very valuable—it was one of the best locations in Chelalis.

I have seen Mr. Bach, the purchaser of the store from the receiver in bankruptcy, from time to time, and he has always expressed his satisfaction, that he is satisfied with the deal. He told me that he had done better than he expected.

Redirect Examination.

(By Mr. ANDERSON.)

Q. You figured you would get \$1,000 less certain small deductions?

A. Well, I always consider a stock of that kind, if you have to put it on a forced sale and turn it into money, would not realize near as much as it would to sell it out in a lump sum, and I claim we got an [75] exceptionally good offer from Mr.

(Testimony of George R. Walker.)

Bach, because he was anxious to locate in Chehalis, and in that particular location, and I rather took advantage of the occasion.

One of the elements was the fact that the business was a going concern with a goodwill.

I considered it a very good sale.

(Witness excused.) [76]

Testimony of Alfred E. Hart, for the Trustee.

ALFRED E. HART, a witness on behalf of the trustee.

Direct Examination.

(By Mr. ANDERSON.)

I went to Chehalis on November 8, 1920—went back there some time in February, 1921—wrote a letter to Mr. LeSourd on April 8th—at the time I was there in April the business had fallen off considerably—sales not near so much as they had been—do not remember the condition of our indebtedness to the Bank on April 8th. I had nothing to do with the books.

It is a fact that the bank had made a determined stand for the payment of its accounts at that time but I cannot recall how much we owed them.

Q. What did the bank say to you about the payments of its account April 8th?

A. They thought they ought to receive something on their notes, that we were not taking care of them—that they ought to have at least \$500.00 or \$1,000 a week—think they said that other creditors were paid and they were not.

(Testimony of Alfred E. Hart.)

I did not say that on April 8th, 1921, Elliott and I had reached the conclusion that the store was in a position where it had to be wound up.

'This letter was written by me on April 8, 1921, to LeSourd reading, "The sale is not coming up to expectations, the average sales not going over \$275 daily so far. As the bank has taken a determined stand for the immediate payment of their loan, or at least \$1000 weekly, I am fearful that some creditor may step in and close us up," was based on the amount of business we were doing and if we had to pay the Bank we were satisfied we could not do it, and some of the rest of the creditors would step in.

Q. And further you said: "There are several accounts long past due and I cannot see how they can be satisfied to the extent of allowing us to continue much longer on the basis we are now conducting the business." [77]

Q. Is that a fact that you had gotten to a point where you were satisfied you could not let the business continue any longer on the basis on which it had run?

A. Without someone stepping in—and suing us—and closing us up.

And to the date when Mr. Elliott concluded his negotiations with Carson-Pirie-Scott company about going east: Well, he had been in correspondence with them for perhaps two or three weeks—just when he concluded the arrangements with them I did not know. He had not made any definite

(Testimony of Alfred E. Hart.)

plans with Carson, Pirie, Scott & Company up to the time I was elected on April 23d, as the proposition had not been accepted by them—think it was a week or ten days before he left.

I did not tell the people at Chehalis generally that I was going to succeed Mr. Elliott—nor the bank, until after it was consummated, when I think I told them I was going to take charge of the store—talked with Mr. Dan Coffman, told him I was going to take charge as soon as Mr. Elliott left, that we were going to continue the business and pay our bills as we had been doing—don't know just what I wrote Mr. LeSourd.

The banker knew from our deposits that the sales were not going well, that they were running only \$275.00 daily—told him that in order to do any business at all, we had to slash prices to such an extent it would mean there would be no surplus over and above the liquidation of the wholesale bills and what was due the bank.

Mr. Elliott was always very optimistic about this business.

The advertisement for the sale in April stated that we were closing out—ran this advertisement during April—were running ads in the papers, "Closing Out Sale".

I expected, from these different sales we were running, that we might be able to continue the business until we had paid up.

Q. Mr. Hart, during all of the year 1921 isn't it a fact that you were making an effort to close out

(Testimony of Alfred E. Hart.)

the store in bulk to any purchaser [78] who would come along?

A. We were trying to reduce the stock to a sum where we could sell it.

I would not say we were negotiating with prospective purchasers during each month in 1921.

It was the plan of the bankrupt to so reduce the stock to a figure in the neighborhood of practically \$10,000 or \$12,000 so we could find a purchaser who would take the business over—cannot say how long this plan was in effect, or how many months. It might have been two or three months.

I went there in February. In March we were running sales so as to pay off our indebtedness and reduce the stock.

Q. And also to close out the store?

A. If we could find a buyer, yes.

As to my experience in the retail dry-goods business, I had been in the business myself, had worked for department stores—five or six years in the retail end of it and seven and one-half in the wholesale.

Q. Let me ask you if on April 13th, you and Mr. Elliott had not reached the conclusion that this business must be wound up, that you could not meet your obligations that were coming due, and there was imminent danger of a receivership?

A. Well, this business had dropped off to such an extent that we could not meet the bills.

Q. Wasn't that discussed between you?

(Testimony of Alfred E. Hart.)

A. Yes, what was going to be done if we could not pay our bills, yes.

Q. Isn't it a fact that on April 13th it had been determined that Mr. Elliott would leave the Company and go to Chicago?

A. I am unable to say on just what date.

Q. Refresh your recollection by looking at your letter dated April 13th, what do you say?

A. Well, that letter doesn't state definitely about Elliott's going. [79]

Q. No, it does not say when he is going, but it does say it has been determined he is going.

A. Yes, it was understood that he would go sometime very soon.

Q. Didn't Mr. Elliott state to you at that time that he could not see how at the rate business was going, that they were going to meet their obligations?

A. To the effect that we were not able to meet our bills as they came due.

Q. That had been talked over between you people?

A. Yes.

Mr. Elliott offered this business for sale to the Mottman Mercantile Company of Olympia in April, 1921—took it up with the son who is in business in Chehalis—they did not make any offer that I know of.

Q. As early as April 28, 1921, is it not a fact, knowing conditions there as to your assets, also your liabilities, that you believed that the creditors

(Testimony of Alfred E. Hart.)

would be fortunate in receiving 75 cents on the dollar on their claims?

A. No, sir.

Q. Refresh your recollection by your letter of April 28 to Mr. LeSourd, isn't that a fact?

A. Just as I stated in the letter.

Mr. McCLURE.—I would like to ask Mr. Hart a question about this letter.

Mr. ANDERSON.—All right.

(In response to questions by Mr. McClure:)

I went to Chehalis in regard to this business at the request of Mr. LeSourd—for the O'Brien interests, the stock interests—and while there, I wrote these various letters to Mr. LeSourd as to what I found—that is the reason I wrote those letters in this way.

Mr. McCLURE.—I object to the interrogatory and to the letter itself on the ground that it is a communication between stockholders, and not binding on the creditors.

The COURT.—Well, he was put in charge of the business at that time. [80]

Mr. McCLURE.—No, there is no testimony to that effect.

The WITNESS.—I was in charge just in name until after he left.

The COURT.—Well, he left on the 27th.

Mr. ANDERSON.—April 28th. He was the man in charge.

The COURT.—The letter may be read; exception.

(Letter read.)

(Testimony of Alfred E. Hart.)

Q. That stated exactly the condition there as I understood it.

A. None of the creditors that I knew of, except the Western Dry Goods Company, were sending representatives to Chehalis, during April while I was there, demanding payment—Mr. Beamer, of that Company, came down. We received some letters requesting payment in April.

I assisted the receiver in taking the inventory made by him. That was taken on the basis of what the goods were marked—the invoice price. I also assisted in taking the inventory just before Mr. Elliott left—on the same basis. Mr. Elliott was still there when we started taking the latter—some time in April—don't just remember the date. It took us three or four days to write it up.

Cross-examination.

(By Mr. McCLURE.)

I talked with Mr. Dan Coffman at the bank—a day or two prior to Mr. Elliott's leaving, or after—might have been about April 28th—think I was making a deposit when the question came up—told Mr. Coffman that Elliott had gone away. He asked what was going to be done about the business. I said, so far as I knew it was going to continue—as a going concern.

My idea in writing this letter to Mr. LeSourd in April, in which I said that in order to do any business at all, we would have to slash prices to such an extent that it would mean no surplus over and above the liquidation of the wholesale bills

(Testimony of Alfred E. Hart.)

and the bank—my idea was that the debts would be paid, but that there would be nothing left for the stockholders. That was my idea up to the date of the appointment [81] of the State Court Receiver.

I might have suggested to Mr. Elliott that I would go to the O'Briens and make an offer for the purchase of the capital stock, about April 13th. I might have done so, we talked it over on several occasions, about buying it. My idea then was that the capital stock still had value.

There was no reason to change that opinion up to the day of the appointment of the Receiver; in fact, I thought so much about the possible success of the store that I worked for several months just for expenses alone, thinking we might be able to get that at a figure we could handle it. I had faith in the store.

I knew O'Brien very well. He was very anxious to save his investment there. I also knew that Elliott wanted to save the loan.

Redirect Examination.

(By Mr. ANDERSON.)

Q. I want to ask the witness if you do not think you are mistaken when you said you told Mr. Coffman, on April 28th, that this business was going to continue as a going concern, after refreshing your recollection by the fact that you were advertising in the newspaper that you were closing out your store?

A. I did not think any other way, because I did

(Testimony of Alfred E. Hart.)

not know at that time what else would be done; and so I just told Mr. Coffman that, so far as I knew, everything would go on and we would continue to pay our bills. I did not know, absolutely, that it would not go on very long, no.

(Witness excused.) [82]

Mr. ANDERSON.—To save time and to save the taking of depositions of Carson, Pirie, Scott & Co., I agreed with their counsel that letters between the two might be put in evidence upon the assurance of Mr. Woodley that they were true copies and they agreed Mr. Climenson might testify as to the condition of the accounts of the several creditors from itemized statements furnished to him at his request by the several creditors.

Mr. McCLURE.—Said testimony to be subject to correction in the course of the trial of any errors shown by the record in the Court.

Mr. WOODLEY.—No objection. [83]

.Testimony of S. G. Climenson, for the Trustee.

S. G. CLIMENSON, a witness on behalf of the trustee.

Direct Examination.

(By Mr. ANDERSON.)

I am the trustee in this matter. Being unable to get at the items of the accounts of the several creditors from an examination of the bankrupt's books, I procured statements from all the creditors except one, Landon Hersheimer Company, which has a claim of \$642.50, also with the further exceptions of

(Testimony of S. G. Climenson.)

Mr. Abel, Allen-Nugent Company and Louis Cohen, whose claims have been filed since I sent for the statements from creditors. I have no idea whether they were creditors the first of January or later.

With three exceptions these itemized statements tallied with the proofs of claims. There were slight discrepancies in three of them, Bee-Nuggett Publishing Company, Nonatuck Silk Company and Twin City Feed Company—considerably less than \$10 in each instance.

(The statements of accounts of various creditors were received in evidence, and marked Trustee's Exhibit "H.")

I have practiced law for some time—am also an accountant—have made a summary from these statements, showing the amounts of the indebtedness of the bankrupt to its several creditors as of January 1, 1921, also of the amounts of merchandise sold by them to the bankrupt and of the payments made to them on account from that date to the bankruptcy.

The percentage figures shown in the column on the extreme right of this sheet, headed "Percentage of Debt Paid," is the percentage of the payment made to the creditors on each individual claim during the year 1921, on their entire indebtedness.

The next column to the left, this first column, showing:

20%, opposite Bee-Nuggett Pub. Co.

9%, opposite Fleischner-Mayer & Co.

9%, opposite Royal Worcester Co.

(Testimony of S. G. Climenson.)

67%, opposite Coffman-Dobson Bank,

55%, opposite Carson, Pirie, Scott & Co.

These are the five accounts that have been objected to by the trustee. [84] The first one, that of the Bee-Nuggett Co., showed a balance due on January 1, 1921, of \$339.50. Since that date, payments were actually made to it in excess of the current bills for goods furnished by it to the bankrupt during that period, resulting in a 20% application on the old indebtedness existing as of January first, and making its present claim, as filed in bankruptcy, \$274.25. In other words, all goods furnished in 1921 were paid for 100 cents on the dollar, and it received an amount of payment over and above that, equivalent to 20% on the balance due it on January 1, 1921. The same thing applies to the three other claims.

In the case of the bank: The bank statement shows that there was \$5,500.00 due it on January 1st, that they advanced \$800.00 later and were paid \$4,000.00, leaving their present claim around \$1,800.00—or 67% of the old indebtedness paid.

This statement (trustee's summary) shows that of the \$13,000.00 paid to the creditors during that period, 64% went to the bank and Carson, Pirie, Scott & Co.—during the four months preceding Bankruptcy. All other creditors got \$4,800; and these two creditors got \$8,500.

To be exact, the period during which these payments were made exceeded the "four months period" somewhat; they ran back to January 1st,

(Testimony of S. G. Climenson.)

and the date of bankruptcy was May 13th. That is the time we took, the first of the year. They were put into the hands of the Receiver in the State Court on May 7th, I think.

Mr. HULL.—Do you contend that is in full? It is simply a summary.

Mr. ANDERSON.—It is a summary, that is all.

Mr. HULL.—It has no value as evidence.

Mr. ANDERSON.—Yes, it has value as evidence. It is a summary of what those books show and what the witness has said, instead of having the Court go through it and make a tabulation himself.

Mr. McCLURE.—I desire to interrogate the witness—I suppose your Honor will let it in for the Court's information and convenience. [85]

The COURT.—Yes.

Mr. McCLURE.—I will formally object to it.

The COURT.—Objection overruled; exception allowed.

(Trustee's summary received in evidence and marked Trustee's Exhibit "I.")

In further explanation of Trustee's Exhibit "I":

Where the figure "O" appears in the second column, it means that, according to the statement furnished me by that creditor, there was no balance due it on January first.

(At request of Mr. Anderson, the witness marks "purchases" and "payments" at the heads of the columns on Trustee's Exhibit "I.")

Turning to the account of (i. e., the statement furnished by) Bee-Nuggett Co., this shows:

(Testimony of S. G. Climenson.)

Balance due January 1st.....\$339.50

Payments since:

April 4339.50

April 25234.50 574.00

Goods and services furnished since:

January234.50

February154.50

March 31.50

April 68.25

May 15.00 503.75

EXCESS 70.25 70.25

Amount of Claim.....\$269.25

Mr. ANDERSON.—We are taking the results of the payments, taken together. * * * and it is our theory of the law; where a creditor furnishes current merchandise and then is paid for it, within the meaning of the Bankruptcy Act, within the “four months period,” one offsets the other; and, in the meaning of the state law relating to preferences, it means that during the period of insolvency one can balance the other. * * *

The COURT.—You are ignoring the old rule that a payment on account applies to the oldest part of it.
[86]

Mr. ANDERSON.—It is my understanding that under the common law the payment relates back to the oldest part of the account, but in the meaning of a preference under the Bankruptcy Act, the courts segregate the period of four months and allow one to offset the other; and if there is no depletion of the estate as a result of the dealings, no preference has taken place.

(Testimony of S. G. Climenson.)

Turning to the statement furnished by Royal Worcester Co., this shows:

Balance due January 1st.....\$158.25

Payments since:

March 4	142.25	
“ 18	14.50	
“ 29	16.00	
“ 25	3.00	175.75

Goods furnished since:

January	2.75	
February	13.38	
“	8.81	
March 23	18.74	
	117.48	161.16

EXCESS	14.59	14.59
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Amount of Claim.....143.68

That shows 9% of the old indebtedness paid.

Turning to the statement furnished by Fleischner-Mayer Co., this shows:

Balance due January 1st.....2,714.59

Payments since

Goods furnished since

EXCESS	220.49	220.49
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Amount of Claim.....2,494.10

That results in a payment of 9% on their old account.

(Discussion between counsel as to trustee's correspondence re Fleischner-Mayer's claim.)

Mr. ANDERSON.—Mr. Hull, can we not stipulate that the debits and credits shown in reference to the bank's claim are correct? [87]

Mr. HULL.—With the corrections that were made on the last item, a credit of \$200 on January 1st on the note of \$2,600,—the credit should be \$143.08.

(Testimony of S. G. Climenson.)

Mr. ANDERSON.—We have a corrected claim filed, and have corrected our objections to it.

Mr. ANDERSON.—Do I understand the last item of \$143.08 was the balance on deposit in the bank which the bank appropriated and applied to its indebtedness?

Mr. HULL.—Yes, they simply exercised their right of setoff, and applied it on the matured note.

Cross-examination.

(By Mr. McCLURE.)

In making up my analysis, I have not assumed all through that the current bills were paid in due course of business as they matured—I did not find that to be the case.

Q. Well, what is the basis of your computation?

Mr. ANDERSON.—I object to that as not proper testimony, that is a matter of argument.

The COURT.—He may answer; exception allowed.

A. To the first part of your question I should say that the bills were not paid in due course of business.

A. Take the claim of the Western Dry Goods Company, Trustee's Exhibit "H"; which shows that on January 1st, 1921, there was an indebtedness of \$904.66, and after that day various invoices of goods were purchased by the bankrupt and payments made by the bankrupt, one of these payments being a substantial sum of \$331.15 on March 15, and another \$492.32 on April 25, 1921,—

A. Yes.

Q. Now, in your computation, on what invoices

(Testimony of S. G. Climenson.)

were the two payments I have mentioned applied?

A. In my computation they were not applied on any invoices, but the payments were applied against the indebtedness that arose after [88] January 1st, 1921.

That is the basis of my computation in this case and all other cases—I made it for the purpose of arriving at an equitable result.

The COURT.—I think the witness should be permitted to explain.

A. I am going to explain not only the figures, but the theory * * * to explain the theory, I must explain the reason for the theory.

When Mr. Abel came to us, about May first, it was understood that something had to be done with the bankrupt concern for the reason that it was claimed that the bank was refusing to pay the Elliott-O'Brien Company's checks until they had their money—have no personal knowledge as to whether that was true—being the attorney for the Seattle Merchants Association, I was requested by Mr. Gounce, the manager of the association, to inform them what action should be taken. The stockholders were not available, so an assignment for benefit of creditors was out of the question, and a suit for a receivership was necessary. After the concern went into bankruptcy, various rumors came to our ears about the Carson-Pirie-Scott claim—that they had put on large sales there and taken the money. Then when I was appointed trustee, Mr. Walker, the receiver, said he had all the books

(Testimony of S. G. Climenson.)

that were turned over to him, and they were turned over to me as trustee. But I could not find any cancelled checks, or check-stubs; and the books were not in such form as to show the indebtedness to each individual. So I simply sent out notices to all the creditors to give me a statement, to arrive at who got the payments—we simply took the period of four months, or practically from the first of the year, to see whether or not any large creditors had been paid at that time.

The books showed that they had always owed past due money. They owed considerable money in 1920, more than they did in 1921. Their sale in November reduced it about \$4,000, but they did not reduce it any further, except the indebtedness was switched—the bank got paid off, and Carson-Pirie got reduced considerably; but they owed [89] other creditors larger amounts. * * *

These payments to the Western Dry Goods Company were simply applied (under my theory) as far as they went on the goods furnished in 1921. They were insufficient to pay for the same, and therefore they have received nothing on their old indebtedness. Under the theory I am presenting in this case, I consider that there has been no preference in the case of the Western Dry Goods Co. * * * I will say this in regard to the Western Dry Goods Company, that it is picked out apparently in this case because of the amount of payments that it received right at the later period. It is quite true that Mr. Beamer, apparently, from the testimony here,

(Testimony of S. G. Climenson.)

was absolutely satisfied that the concern was going to run, in spite of the fact that correspondence was already had between these parties that it was going to close up, three weeks before.

Fleischner-Mayer likewise had received quite a large sum of money, \$1,717.26, as you will notice. One difference was: If the Western Dry Goods Company had received \$200 more they would have been in the same position as Fleischner-Mayer, because they (Fleischner-Mayer) received a little on the old indebtedness.

(Here follows extended discussion between counsel and the referee, as to the theory presented by the trustee—attempting to define same—part of which is as follows:)

The COURT.—Mr. McClure's theory is that this business was running along in the ordinary way, all purchases were made in the due course of business and all bills paid in due course, and right up to the time they had to quit.

Mr. ANDERSON.—Yes, and it is our theory that they were not paid in due course. Debts were accumulating and getting past due all the time, all during the period of 1921. In other words, the company was insolvent from 1921 down to the date they closed, because they were not paying their bills in due course, when they became due in the ordinary course of business. [90]

(By Mr. McCLURE.)

Q. Take the claim of Marshall-Field Company—as to that company there was nothing due on the

(Testimony of S. G. Climenson.)

first of January, and after that merchandise of \$697.83 was received and nothing paid?

A. Yes.

Q. And yet, the Western Dry Goods Co. and Fleischner-Mayer received large sums of money after January 1st, on current invoices. What is the trustee's analysis of the situation with respect to a preference * * * as between Western Dry Goods Company and Marshall-Field & Company?

A. You mean in the eye of the law, or actual fact of payment?

Q. I mean your view—you are a lawyer. Was there a preference in favor of the Western Dry Goods Company as compared with Marshall-Field & Company?

A. Yes, my view undoubtedly is that if Marshall-Field & Company had had a man on the ground and was as energetic as some of the creditors, they would have got some money also.

Q. Is that the only answer you can give to the question?

A. That is the only answer I can give you, otherwise everybody has a preference over everybody else unless you take the actual percentage. We have to have some starting point and some point to arrive at. I have taken four months.

Q. If you are satisfied, I will be satisfied with your answer.

A. It is a very hard question to answer, Mr. McClure, because you can readily see we have to take the entire cash derived for the period of insolvency

(Testimony of S. G. Climenson.)

and prorate it, which would make an adjustment for every creditor.

My investigation of the accounts of the creditors was confined to the creditors filing claims. I might say that there was \$2,000 paid off and we do not know whom it was paid to. The books do not show the creditors paid, and we have no claims filed, and we cannot establish who they are; in other words, there was \$2,000 existing the [91] first of January, about \$2,000—wasn't it Mr. Woodley, you checked it over with me?

Mr. WOODLEY.—I do not remember.

The WITNESS.—Whatever it was, I do not absolutely know who the creditors were, have no knowledge. All we can do is take the people who are before us.

(Witness excused.) [92]

**Testimony of William F. Elliott, for the Trustee
(Recalled—Cross-examination).**

WILLIAM F. ELLIOTT, a witness on behalf of the trustee, recalled for further cross-examination.

Cross-examination.

(By Mr. WOODLEY.)

The inventory figures, about which I testified yesterday, which I completed on the night before I left Chehalis, April 27th, were, as I recollect:

(Testimony of William F. Elliott.)

Merchandise stock	\$16,000.00	
Fixtures	4,000.00	
Accounts receivable	500.00	(at least)
	<hr/>	
Totaling.....	\$20,500.00	

That \$16,000.00 of inventory value was made, as near as I could figure it, at the market value at that time. By that I mean the replacement value.

At that time the stock received before the first of the year was heavier than the stock we had received after the first of the year, a good deal heavier.

On the occasion when Mr. LeSourd was down at Chehalis, on April 22d, we made up a list of the indebtedness, which showed when the indebtedness fell due with discount, or net. That list approximately shows the state of our merchandise accounts on April 22, 1921—and the months in which they fell due and the creditors to whom due in those months. There might have been a few items that were not exactly right, but the amounts were approximately correct—within \$100. Absolutely everything was taken off of our books according to our ledger account. [93]

Mr. CLIMENSON.—This purported statement of accounts shows a very small amount due in January. All the rest of the indebtedness came along after that period. This \$1,200 undoubtedly corresponds with his \$1,200 of past due bills.

The WITNESS.—“Past due” is “Due”; they mean the same (in this statement and on our books).

Mr. ANDERSON.—And you had a bunch that fell due in January and another that fell due in Decem-

(Testimony of William F. Elliott.)

ber. Now if this was written off (made out) the 31st of December, the bills that were not paid up to December first were past due bills, and the bills that fell due during December—

A. Were past due.

These other items here, Bee-Nuggett, etc.—I cannot tell whether they were past due—some possibly were—the 1920 taxes were not due until this year—the 1921 taxes were not due until next year—our overdraft at the bank was due in April, yes, and we renewed our notes at the bank, \$5,500.00.

Q. You would have constantly renewed your notes at the bank?

A. Our notes up to January first had been on demand. The scattered accounts would have taken care of themselves. We seldom let them go over, except the Bee-Nuggett account. It went over only two months. But the other scattered accounts, we always took care of them as they fell due.

(The list of indebtedness referred to was admitted in evidence as “Respondent’s Exhibit 1.”)

[94]

Testimony of D. T. Coffman, for Respondents.

D. T. COFFMAN, a witness on behalf of the respondents.

Direct Examination.

(By Mr. HULL.)

I am the cashier of the Coffman-Dobson Bank, one of the claimants here—the one who negotiated with the Elliott-O’Brien Company most of the mat-

(Testimony of D. T. Coffman.)

ters that they had up with the bank.

Elliott-O'Brien Company's statement of December 31, 1920, now shown me, was handed to me by Mr. Elliott in the usual course of business.

(Elliott-O'Brien Company's Statement of December 31, 1920, was admitted in evidence, as "Respondents' Exhibit 2.")

Thereafter I discussed with Mr. Elliott the condition of his business, from time to time. These conversations did not disclose any material change in the condition of the business—showing a margin of surplus over the debts.

Q. Now, Mr. Coffman, when did you first learn of any difficulty with the Elliott-O'Brien Company?

Mr. ANDERSON.—I object to that as immaterial.

The COURT. — Objection overruled; exception allowed.

A. The 3d or 4th of May. Some checks came through bearing the indorsement of Elliott-O'Brien Company, from one of the other banks in the city. We immediately went up to our attorney, Mr. Hull, and asked him if he knew of any trouble; and he took it up with one of the other attorneys in town and reported that he was the representative of Elliott-O'Brien Company and he had had a conference with the Seattle Men's Association. On receipt of that advice we charged the account with the balance and applied it on our note which was past due.

Up to that time the Elliott-O'Brien Company had

(Testimony of D. T. Coffman.)

been carrying a balance in their account practically the same amount as they had for years.

During the month of March, or thereabouts, the stock of Charles O'Brien and the other O'Briens had been deposited in our bank in [95] our bank in escrow for some period of time—purchased by Mr. Elliott, under conditions attached to the escrow.

Mr. HULL.—That is all.

Cross-examination.

(By Mr. ANDERSON.)

The three notes, which we held, dated January 1, 1921, fell due April 1st. As to making a demand for payment, we called Mr. Elliott over and asked him what he could do about it. He said they could make payments of a thousand dollars a week on those notes, as the outcome of this sale which they were going to have.

I don't think I made complaint, either to Mr. Elliott or Mr. Hart, that they were paying off the merchandise creditors and letting the bank go. We thought it was time that they would reduce and they made a voluntary statement that they would make a reduction to us of a thousand dollars a week.

They had closing out signs on their building, during 1921. It was not generally understood, however, in Chehalis, that they were going to close their business, close out as fast as they could—they were not.

Q. Didn't you know they were advertising for a purchaser to sell out?

(Testimony of D. T. Coffman.)

A. We supposed that they were going to continue in business.

Q. The question was whether you knew they were looking for a purchaser?

A. I knew they had purchasers in view.

Q. You knew they were planning to sell out and quit?

A. Not unless they found a purchaser.

Q. If they could get one they would, and they were looking for one. When did you first learn of that fact?

A. Along about the 15th or 16th of April possibly. [96]

Q. When did you first learn that Elliott was going to leave the Company and go to Chicago?

Mr. HULL.—I hardly think this is cross-examination.

The COURT.—He may answer if he knows.

A. I don't know as I knew that definitely until after he had left. Mr. Hart came in and told us he had gone.

I did not know on the 23d of April that Mr. Hart had been elected secretary of the concern in place of Mr. Elliott, resigned—don't think I knew, before the change actually was made, that they planned on substituting Hart for Elliott. Our records probably show when the signature card was changed. I do not know when that occurred. In the regular course of business it would not necessarily have been at the time the election took place; I think Mr. Elliott signed checks up until the night he left.

(Testimony of D. T. Coffman.)

I do not know as to whether there was an overdraft at the bank during April, 1921—presume the ledger sheet would show.

The COURT.—Did this company do all its banking in your bank?

A. It did up until the 3d of May.

Q. That is what put you on inquiry?

A. Yes. They had been doing business with us in the regular course of business and suddenly stopped.

Mr. ANDERSON.—Q. Looking at the bank ledger-sheet, read off the balances of the bankrupt with the bank commencing with April first?

A.

April 1.....	357.69
1.....	683.66
2.....	1221.19
5.....	1051
6.....	242.16
8.....	223.42
9.....	16.20
	overdraft
11.....	180.58
12.....	282.21
13.....	129.24
14.....	33.03
15.....	412.78
16.....	452.79
18.....	751.15
19.....	736.00
20.....	742.83

(Testimony of D. T. Coffman.)

	21.....	864.78
	22.....	861.28
	23.....	369.71
	25.....	1281.72
	26.....	1461.66
	27.....	616.07
	28.....	964.62
	29.....	720.30
	30.....	928.78
May	2.....	427.65
	3.....	158.50
	4.....	143.08

The account was closed the next day, May 5th.

The deposits during the same period of time were:

April	1.....	408.85
	2.....	403.23
	3.....	816.65
	5.....	344.77
	6.....	291.65
	7.....	347.06
	8.....	146.00
	9.....	265.63
	11.....	393.28
	12.....	126.63
	13.....	202.72
	14.....	403.79
	15.....	379.75
	16.....	240.01
	18.....	327.19
	19.....	827.95
	20.....	215.81

(Testimony of D. T. Coffman.)

21.....	173.04
23.....	622.80
25.....	1199.51
26.....	414.44
27.....	353.03
28.....	385.30
29.....	255.68
30.....	234.36
May 3.....	239.32

Q. Mr. Elliott said the bank had been carrying the bankrupt for two or three years for approximately this amount which was owing January 1, namely, \$5,500. That is correct according to your figures?

A. Had been carrying them more than that.

Q. On January 1, when these three notes were executed, they were in fact renewal notes of the old notes that had been previously given?

A. We granted a credit there of \$5,500 for three months.

Q. But some time during 1920 he had borrowed at least as much as \$5,500 and given his notes which fell due January 1, 1921, hadn't he? [98]

A. They were demand notes up to that time.

Q. He borrowed at least as much as \$5,500.

A. Borrowed more than that.

On January 1st, he (the Elliott-O'Brien Co.) executed three notes which took up the demand notes previously given. We carried him after he made the demand notes as an ordinary customer, in the ordinary course of business.

(Testimony of D. T. Coffman.)

At no time during 1918, 1920, or 1921, was the bank account over balance so that the company owed the bank nothing.

Q. Now, those three notes fell due April 1, 1921. Did Mr. Elliott on behalf of the bankrupt ask to take up the old notes by giving new notes?

A. Simply stated he thought he could pay a thousand dollars a week; and we let the notes stand that way with that provision. When the notes fell due he had a regular notice in the course of business—that these notes would fall due on April 1st—and he came in and said he could pay them off at the rate of \$1,000 a week—didn't ask for an extension.

Q. Mr. Coffman, isn't it a fact that in order for the Elliott-O'Brien Company to continue in business they must have credit with the bank just as they had in the past, or in approximately the same amount, in order to conduct their business as a going concern?

A. Their own statement was, that they would not then be able to get along without the help after they had cleaned up, that they probably would come back and ask us to discount bills; and we probably would have taken care of them. We were liquidating as any other bank was at that time.

Q. If they paid you off in full at the rate of \$1,000 a week, they would not have any credit with the bank to do business in paying off their merchandise bills, would they?

A. Well, that could have been left with us to

(Testimony of D. T. Coffman.)

judge, after they paid off. [99]

Q. You were familiar with the deposits during February and March? You knew if they paid you \$4,000 in the month of April they would not have anything left for their other creditors, would they?

A. They were putting on special sales and expected to raise quite a sum of money.

Q. You knew there was a man there from Portland to put on an extra special sale?

A. I think there was a man there from the outside.

I do not remember any such advertisement—offering their merchandise at 50 cents on the dollar, or two dollars for one. They were offering inducements.

Redirect Examination.

(By Mr. HULL.)

In a small city it is not at all unusual practice for merchants to have an outside man come in to conduct a sale. Solvent, going concerns periodically do that.

Recross-examination.

(By Mr. ANDERSON.)

Q. Do you know of any solvent concern in Chehalis that has brought an outside man in and conducted a special sale—and continued in business?

A. I do.

(Witness excused.) [100]

**Testimony of William F. Elliott, for the Trustee
(Recalled).**

WILLIAM F. ELLIOTT, a witness on behalf of
the trustee, recalled.

Direct Examination.

(By Mr. ANDERSON.)

This statement, Respondent's Exhibit No. 2, dated
December 31, 1920, furnished to the bank according
to Mr. Coffman's testimony, is the identical state-
ment we sent also to Carson, Pirie, Scott & Co.—a
copy—we made three copies—showing the condition
of the business December 31, 1920.

(Witness excused.)

(Case closed.)

[Indorsed]: Apr. 4, 1922. [101]

Trustee's Exhibit "A."

CARSON, PIRIE, SCOTT & CO.
CREDIT DEPARTMENT.

Chicago, February 17, 1921.

Mr. C. L. LeSourd,
c/o Dexter Horton Trust & Savings Bank,
Seattle, Washington.

Dear Sir:—

I have been advised by Mr. Hart and Mr. Elliott
that they have talked with you about matters at
Chehalis. As you know, Mr. O'Brien is away and
it will possibly be some weeks before we can get
into direct communication with him again.

I am writing both Mr. Hart and Mr. Elliott today that all arrangements with reference to the store must be made with you as you are fully empowered to act for Mr. O'Brien. I feel that it would be best for all concerned to have this business closed out as speedily as possible, but no doubt you are in closer touch with conditions and whatever action you may decide upon I am sure will be perfectly satisfactory to Mr. O'Brien.

If you make any definite arrangement with reference to disposing of this matter, I will appreciate it if you will advise me so that as soon as I again get in touch with Mr. O'Brien I can let him know what has transpired.

Yours very truly,

C. T. DAVIS.

CTD.

EE.

Feb. 18, 1921.

Mr. C. H. O'Brien,
c/o Mr. Coram. T. Davis,
Carson, Pirie and Scott,
Chicago, Ill

Dear Sir:—

There is little of news to report concerning the situation at Chehalis. Several days ago Mr. Elliott and Mr. Hart called upon the writer, and the proposition for sale of the stock was clearly set before Mr. Elliott. I tried to show him the advantage to him of obtaining a cash purchaser for the stock, telling him that in all probability if you could obtain payment of your notes and 50 cts per dollar upon your

stock, you would without doubt overlook his indebtedness to the corporation of approximately \$5000.00. I told him that while I have no positive information, I supposed that unless some satisfactory sale could be accomplished that in the final closing out of the stock a judgment would be taken against him for the amount due the corporation. [102]

Mr. Elliott seemed to think that on account of present conditions no advantageous sale could be made, and Mr. Hart joined with him in this position. They both claimed that a greater return could be accomplished by putting on a closing out sale, which we understand they are now doing. Mr. Hart has returned to Chehalis with Mr. Elliott, telling me that the only cost Elliott-O'Brien would be put to—would be the actual expenses.

I have talked with Mr. Adams of the local Carson, Pirie and Scott Co. office, and have him on the look out for a prospective purchaser.

I am not just satisfied with the arrangement at Chehalis at present, but do not know of a good man to place in charge. Mr. Elliott intends to purchase a little Spring stock to mix in with the other, probably about \$1500.00 worth, and has gone to Portland for that purpose.

Received a letter from Mrs. Alice B. O'Brien, advising that she would dispose of her stock for 50 cts on the dollar, but have heard nothing from Salt Lake City. We are hoping that some person will yet be found to purchase the stock as it stands, but if such a one cannot be found, it would probably be better to allow the stock to be closed out. Messrs.

Elliott and Hart seem to think that when the stock is reduced to about \$10,000.00—which they believe can be accomplished by about July—that it would sell more readily than now.

We are perfectly willing and glad to render all the help we can in this matter, but cannot give it the undivided attention that we could were we on the ground. With best personal regards, I am,

Yours very truly,

Asst. Cashier.

CLL:P.

March 5th, 1921.

Mr. W. F. Elliott,
c/o Elliott-O'Brien Company,
Chehalis, Washington.

Dear Sir:—

We thank you for the statements of amount of business done during February, and notice that your sales exceeded your bank deposits about \$600.00. Presumably this is an addition to your book accounts. We also notice that you paid wholesale accounts totaling about \$3600.00. We would like to have similar statements each month; also statement concerning the amount of goods purchased, or the inventory value of goods on hand. In other words, we would like to keep in touch with the situation to know if the indebtedness of the firm and the inventory value of stock is being reduced proportionably. [103]

A dry goods man by the name of Max Davis, who now owns two or three stores in different cities,

interviewed us this week concerning purchase of business of Elliott-O'Brien Company. We believe however, that he considered the obligation a little too heavy for him to assume at this time. He was also considering a store in Centralia, and it may be that he will drop in to see you.

We are interested to see the business closed out satisfactorily, either by disposing of the stock as you are now doing—or by a satisfactory transfer of the entire business, for your own good as well as for the interests of the O'Briens. While we are not authorized to make such a statement, it is the writer's opinion that if some reasonable amount, say 50%, can be realized on the stock—the O'Briens will take no action against you personally on your indebtedness to the firm. However, if nothing can be realized on the stock directly, you could not expect them to overlook that account.

With best personal regards to you and Mr. Hart, we are,

Yours very truly,

Asst. Cashier.

CELL:P.

Mar. 12, 1921.

Coram T. Davis,

c/o Carson, Pirie, Scott & Co.,
Chicago, Ill.

Have received tentative cash offer to purchase merchandise stock of Elliott-O'Brien Company at ninety cents on the dollar present replacement value fixtures and other assets to be included without

additional cost. Elliott shows stock about twenty six hundred, book accounts fifteen hundred, other assets two hundred and fifty. Liabilities past due for merchandise thirty four hundred, now due and maturing ninety three hundred, due to bank Seventy-one hundred. Miscellaneous liabilities Sixteen hundred.

Apparently proceeds of such sale would just about pay debts believe we should get 100 cents on dollar same proposition otherwise. Fear receivership if business drifts along. What do you think of the proposition.

Suggest you wire me must get full replacement value of merchandise. If you think sale should be made at ninety cents send separate wire.

C. L. LeSOURD. [104]

ELLIOTT-O'BRIEN CO.

Chehalis, Wash., Mar. 14, 1921.

Mr. C. L. LeSourd,

c/o Dexter Horton Trust & Savings Bank,
Seattle, Wash.

Dear Sir:—

Continuing our conversation over the phone.

The charge accounts run approximately \$1189.22.

Regarding the taxes for the year 1921, which was assessed on Friday last and which is not due or payable until March 15th, 1922. Unless there is some understanding between ourselves and Mr. Worth or anyone else who might buy the stock, we are held liable for the payment of the tax, which will amount to about \$500.00. The person buying the stock could continue to do business until Feb.

28th, of the next year and then move out and get out of paying any tax for the year.

There is no question that the person who buys the stock at this time should assume this years taxes.

Should Mr. Worth decide to buy the stock at market value it will require a good referee to adjust the differences between Mr. Worth and myself regarding just what would be the market value of various items. Merchandise for instance that we have had in the store say for two years, which has not advanced or declined. The better plan as I see it would be to sell the stock at the present market price, which was the price taken in at inventory. Have gone over every item and made deductions where necessary, but did not raise any costs so it would be a fair way of calling it in. Mr. Gray agreed when he and Mr. Worth were here that would be the best way to inventory the stock.

Have not made the correction on the price tickets as yet, but intend going over everything tomorrow. Have all the notations on our Inventory sheet.

Believe it good business to keep the cash register, also the accounts. Feel we would obtain some benefit from them.

Yours very truly,

ELLIOTT-O'BRIEN CO.,

By W. F. ELLIOTT.

March 16, 1921.

Mr. W. F. Elliott,
c/o Elliott-O'Brien Co.,
Chehalis, Wn.

Dear Sir:—

Thank you for your letter of March 14th, regarding the [105] proposed sale of stock. Your suggestion regarding taxes is good, and should a sale be made we will see that there is a distinct understanding that the purchaser shall pay the 1921 taxes.

Have heard nothing from Mr. Worth since he was in the Bank last Saturday morning. Unless he is willing to pay the present replacement value of the stock, we are in favor of closing out the stock along the lines planned. It would seem that if we threw in the fixtures, which are worth three or four thousand dollars—together with the goodwill of the store, that the purchaser would be making an excellent buy to pay only for the stock. In the event Mr. Worth should agree to pay one hundred cents on the dollar for the stock, the writer would probably come to Chehalis to close the matter up. Would prefer that you be present at that time the agreement was signed—in order that no details might be overlooked.

Yours very truly,

Asst. Cashier.

CLL:P.

March 16, 1921.

Mr. Coram T. Davis,
Carson, Pirie, Scott & Co.,
Chicago, Ill.

Dear Sir:—

Thank you for your telegram of March 14th, regarding proposed sale of the merchandise stock of Elliott-O'Brien Company. The proposal to buy came from a Mr. Worth who was formerly in the dry goods business in Chehalis, Washington. He has recently sold out a store in Oregon, and has available cash to purchase, but he is evidently looking for a big bargain.

As we see it, there is no object in us giving the stock away, and if he unwilling to pay one hundred cents on the dollar for the stock we are inclined to proceed with the plan to close the store out by disposing of the stock gradually to customers until it has been reduced to ten or fifteen thousand dollars, when it would be easier to find a purchase. This is probably going to be difficult to accomplish, however, as some one might step in and demand that a receiver be appointed. The stock is evidently worth somewhat in excess of the debts, but it is going to be another question to realize on the stock as rapidly as the obligations mature.

The telegram to you was sent at the request of Mr. Worth, but we have heard nothing from him since that date. He seemed to be anxious to get the store and we believe that he will yet meet our proposition. It appears to us that if we sacrifice the fixtures, which are carried on the books for an

amount between three and four thousand dollars, also the goodwill—whatever that may be worth, the purchaser would obtain an excellent buy by taking the merchandise off our hands at the present market value. Will drop a note to Mr. O'Brien at the Waldorf-Astoria, and tell him what is being considered.

Very truly yours,

Asst. Cashier.

CLL:P. [106]

March 19, 1921.

Mr. W. F. Elliott,
c/o Elliott-O'Brien Co.,
Chehalis, Wash.

Dear Sir:—

Having heard nothing further from Mr. Worth concerning the proposed purchase of the store, we presume that he has given up the matter. Therefore unless other offers come to us we will proceed to liquidate the stock according to our original plan. If we accomplish this successfully it will require the greatest economy in operation in the store, an absolute stop of all purchases, and careful consideration given to expenditures.

Your very best judgment will be required concerning the question of order in which invoices shall be paid. No doubt some of the firms will be inclined to press for payment, while others will be more lenient. Our greatest difficulty will be to keep away from a receivership, and this can only be done by keeping everyone satisfied. It is our judgment that even if we cannot make large payments to the

creditors—that if we continue to make numerous small payments we will probably retain their confidence.

In your opinion there are two or three months of good business ahead of you, and by that time the stock should be reduced to approximately \$15,000.-00. If the store can be carried along until that time there should be little trouble in disposing of same.

With best regards, I am

Yours very truly,

Asst. Cashier.

CLL:P.

ELLIOTT-O'BRIEN COMPANY.

Chehalis, Wash., March 28, 1921.

Mr. C. L. LeSourd,

Dexter Horton Trust & Savings Bank,
Seattle, Washington.

Dear Sir:

Received a wire from Carson, Pirie, Scott & Co. this A. M. advising me that they had mailed letter Saturday last containing full particulars; will advise you if there is anything of importance contained in the letter.

Our sales manager is here from Portland and has started preparations for the final thirty day sale. They claim they can dispose of \$16,000.00 worth of goods during the thirty days sale above making all the expenses. If they can do this it will leave us with a stock of \$10,000, or thereabouts, plus fixtures, totalling \$4000.00. [107]

We are hoping to have a buyer lined up by that

time to take this over. We shall have all indebtedness paid, with the exception of about \$2000.00. If we could dispose of the remnant of the stock and fixtures at sixty cents on the dollar, at the market price, it would give us \$8400.00 less the \$2000.00 owing by us, leaving a net balance of \$6400.00, say, conservatively, \$5000.00. This should absolve me of all indebtedness to the Firm, also personal notes to Mr. O'Brien. *I would like to have this distinctly understood.*

I feel that Mr. Hart should be entitled to something more than just his expenses which amount to about \$125.00 monthly. He is very valuable at this time.

I feel with the thirty days sale on I should be here until the affairs of the business are wound up, that may even occur during the thirty days.

Should I accept Carson, Pirie, Scott & Co. proposition it might be possible for me to go to Chicago about April 15th, and return here at the end of the month. Believe that under the circumstances they would be willing to have me do this. Will advise you in a few days. If this letter contains anything of moment.

Yours very truly,
W. F. ELLIOTT.

THE MOTTMAN MERCANTILE CO.

Olympia, Washington, 4/6/21.

Mess. Dexter Horton Co.,

Seattle, Wn.

Gentlemen:—

We understand that you will have the final say in the disposition of the stock and fixtures of the Elliott-O'Brien Co. Chehalis Wash. and what remains thereof unsold when the closing and sale now in progress is over with, if this is correct information we would like to know what you expect to realize out of the remnants upon a cash basis?

Yours very truly,

THE MOTTMAN MERC. CO.

A. M. MOTTMAN.

April 7, 1921.

The Mottman Mercantile Co.,

Olympia, Washington.

Gentlemen:—

Relative to disposition of stock and fixtures of Elliott-O'Brien Company, Chehalis, wish you would communicate with Mr. W. F. Elliott, Treasurer of the Company, who is Manager of the store at Chehalis.

Yours very truly,

Asst. Cashier.

CCL:P. [108]

ELLIOTT-O'BRIEN CO.

Chehalis, Wash.

THE MOTTMAN MERCANTILE CO.,

Wholesale Jobbers & Retailers.

Olympia, Wash., April 8, '21.

The Elliott-O'Brien Co.,

Chehalis, Washington.

Gentlemen:—

Replying to your telegram of this day will say when you get through with your present closing out sale I may look over your remnants and fixtures and make you an offer—if I can figure out a way to use them at all.

Chehalis is a badly demoralized town as far as the Dry Goods business is concerned—it is along with Centralia the best looking town in the State of Washington and the poorest business town, largely brought about by the store-keepers themselves, cutting everybodies throat, including their own. The buying public has no confidence in the merchants and the merchants have no confidence in themselves or their fellow merchants. A price ticket means nothing to the Centralia and Chehalis store-keepers not to themselves—their help—nor the public. The field is not inviting to people whose training is along legitimate lines.

Frankly speaking, had I known that such conditions existed in Chehalis as we found out to our loss and sorrow, we never would have opened a store there. My son succeeded in dropping over \$10,000 in the last eight months, partly legitimate through shrinkage of values and partly due to demoralized business conditions.

A great deal of this letter is strictly personally and confidential and we hope you will so consider it.

Thanking you and congratulating you for leaving such a nerve wracking field and wishing you success and prosperity in your future undertaking, I am

Yours very truly,

Signed—GEO. A. MOTTMAN.

(Copy of original.)

ELLIOTT-O'BRIEN CO.

Chehalis, Wash., April 8, 1921.

Mr. C. L. LeSourd,

Dexter Horton Trust & Savings Bank,

Seattle, Wash.

Dear Sir:—

Mr. Elliott's letter of yesterday will explain his attitude regarding giving us a Bill of Sale of the Automobile. His ulterior motive is to force a judgment against him in order that he may go into bankruptcy and thus clear him of his liabilities. The matter now rests with you as to what action you think advisable. [109]

In regard to business. The sale is not coming up to expectations, the average sales not going over \$275.00 daily so far. As the bank has taken a determined stand for immediate payment of their loan, or at least \$1000.00 weekly, I am fearful that some creditor may step in and close us up.

There are several accounts long past due and I cannot see how they can be satisfied to the extent of allowing us to continue much longer on the

basis we are now conducting the business. In order to do any business at all, we have got to slash prices to such an extent that it will mean no surplus over and above the liquidation of wholesale bills and the bank. Elliott's optimism as regards a surplus is only speculative; his expectations have never been realized since I have had any check on him.

We are going to run a special sale next week in which we will advertise goods at half price, which figures out would amount to what we would have to take in selling the stock at market prices. I have suggested getting in touch with Mr. Worth again to the effect that we will take inventory the last week of the sale suggesting that if he is still interested, to come here and take inventory with us and then make us an offer. I believe I will write him to-day. We have not received any response to our advertisement thus far and judging from the inquiries we have had, they look anything but promising.

Please treat this information as confidential so far as Mr. Elliott is concerned. With kind regards.

Yours very truly,

Signed—A. E. HART.

April 9, 1921.

Mr. Donald G. Abel,
Attorney at Law,
Centralia, Washington.

Dear Sir:—

This letter is written you at the suggestion of the

Attorneys for this Bank, Messrs. Poe and Falknor:

In order that you may have a clear understanding of the matters referred to herein—so that you may know whether or not you care to take over the case, we will go into the history of same quite completely:

About two years ago this Trust Company was named as Administrator with Will annexed to the Estate of E. M. O'Brien, deceased. Mr. O'Brien was a wholesale dry goods salesman and represented Carson, Pirie, Scott & Co., of Chicago, in the Northwest, having his office in Seattle. His estate descended in equal shares to C. H. O'Brien, a brother of Chicago; Alice B. O'Brien, widow, now of San Francisco, and several minor nieces and nephews of Salt Lake City, who divided among themselves a one third interest in the estate.

Several years before Mr. O'Brien's death, he entered into a corporation known as the Elliott-O'Brien Company, operating a dry goods store at Chehalis, Washington. [110]

The store was incorporated for \$15,000.00; Elliott taking seventy five shares, and O'Brien taking seventy five shares. According to the information which we have, Elliott had only \$4500.00 to invest, and accordingly O'Brien loaned him \$3000.00, taking part of his stock as collateral security. This note of Elliott's was included in the assets of the estate and was accepted by C. H. O'Brien as cash in distribution. The one-half interest in the store belonging to O'Brien was distributed—as suggested above—twenty-five shares to C. H. O'Brien; twenty-five shares to Alice B. O'Brien, and twenty-

five shares among the six nieces and nephews at Salt Lake City.

In addition to the indebtedness mentioned above, Elliott borrowed money from C. H. O'Brien, giving the balance of his stock in the Elliott-O'Brien Company as collateral security. In other words, we are now holding for collection for C. H. O'Brien notes by Elliott for \$4500.00; with seventy five shares of stock of Elliott-O'Brien Co., as collateral. We are also holding the certificates of stock for twenty five shares belonging to C. H. O'Brien. The latter recently left for Europe, sending a general Power of Attorney to the writer, asking that I look after his interest with reference to matters at Chehalis.

The store has never paid a dividend, largely due to poor management upon the part of Mr. Elliott. He is without a good salesman but has never bought wisely, and has never been able to sell the amount of goods that he expected to sell. At the end of December he sent us a statement of the Company's affairs, as per copy enclosed. The Inventory is without doubt much too high and there is grave question whether or not the business will more than pay the indebtedness, and it has been decided to carry on a closing out sale and liquidate the corporate business in that way. Some specialists in sales have been brought up from Portland and are now trying to reduce the stock as rapidly as possible, with the hope that if they can bring the inventory down to \$10,000.00 or \$15,000.00, a buyer can be found. I am extremely doubtful whether this

can be accomplished, inasmuch as the sale is not proving a success and creditors are beginning to press for payment of their account. The Coffman-Dobson Bank has made a demand for payment of \$1000.00 per week upon their account. We feel that a Receivership is imminent. Possibly that is the best way out of the affair.

In addition to the salary which Mr. Elliott has drawn from the corporation—from time to time he has taken additional cash—charging the same to his account. This was done without the approval of Mr. O'Brien, although so far as we know he never took any drastic steps to stop it. At the time of Mr. O'Brien's death this account was in the neighborhood of \$3500.00. Since that time and positively without the approval of others interested in the firm—Elliott has withdrawn for his personal use something like \$1500.00, so that his indebtedness to the corporation on open account is now about \$5000. It seems to me that a charge of larceny could be sustained against him on this account.

Among Mr. Elliott's assets is an automobile which has a value of nearly \$1000.00. Just before Mr. C. H. O'Brien left for Europe, he wired to me, asking that I make demand upon Elliott for the sale of the Automobile, making application of the proceeds on the notes which we hold. Mr. Elliott has replied that he would do this providing the notes were canceled and returned. We are, of course, particularly anxious to protect the interest of C. H. O'Brien, whom we represent by Power of Attorney, but also would like to see the other heirs of

Ed. O'Brien obtain something from the assets of the store, if possible.

Would this be a matter in which you could represent us, and if so, upon what basis would your charges be fixed? The writer has no money of C. H. O'Brien in his possession, and would prefer that [111] your charges be placed upon a percentage basis, if that is entirely satisfactory to you.

Should you wish to obtain authority direct from the widow at San Francisco, and from the children at Salt Lake, we believe that this could be easily done without great delay. Most of the children in Salt Lake are minors, and are represented by Halloran-Judge Trust Company, their guardian. It is our impression that with a little pressure Mr. Elliott will do almost anything that is asked of him in the way of making a settlement of his account—but without doubt at this time his desire is to have someone force him into involuntary bankruptcy, and thus clear up his debts. He is hoping to get away from the store within the next two or three weeks, so that he may accept a position as traveling salesman for Carson, Pirie, Scott & Company.

Would be glad to hear from you if you care to take over this case, and if you will, will gladly send to you a bundle of correspondence regarding same.

Yours very truly,

CCL:P.

April 11, 1921.

Mrs. Alice B. O'Brien,
Plaza Hotel,
San Francisco, Cal.

Dear Madam:—

We regret to advise you that at the present time it appears as if you would receive little or nothing from your stock in the Elliott-O'Brien Co., at Chehalis, Washington.

At the time of the administration of the estate the valuation of par was placed upon the stock, largely due to reports as sent out by Mr. Elliott, the manager of the store. After the administration we did not keep in close touch with Mr. Elliott, and now find that matters are in a very serious financial state. A heavy stock of goods has been carried on hand for several years, and as prices dropped subsequent to the close of the war a severe loss ensued.

One of the assets of the corporation as shown by its books, was the personal indebtedness of Mr. Elliott to the corporation, of several thousand dollars. This obligation is without doubt worthless at this time. Recently Mr. C. H. O'Brien left this country on a trip, sending to the writer Power of Attorney to represent him in connection with matters at Chehalis. You will probably recall that Mr. O'Brien accepted as cash Mr. Elliott's personal notes for a considerable amount in the disposition of the estate of E. M. O'Brien. As Mr. Elliott has no considerable amount of property other than his interest in the store—you will see that Mr. C.

H. O'Brien will not only receive nothing for his stock in the corporation but will also lose the face value of the notes.

We have been trying to find a purchaser to take over the store as a going concern, but have been unable to obtain an offer of more than sixty cents on the dollar for stock and fixtures. [112] This would hardly pay the indebtedness, and we have been trying special sales to convert as much of the stock into cash as possible. It is probable that the store may be closed and placed in the Receivers hands—should some of the creditors demand payment of their accounts.

We are hoping that some small amount may be saved for the share holders, but are dubious at this time.

Yours very truly,

Asst. Cashier.

CLL:P.

April 11, 1921.

Mr. L. W. Sowles Vice President,
Haloren-Judge Trust Co.,
Salt Lake City, Utah.

Dear Sir:—

We regret to advise you that from present appearances little or nothing will be realized by the heirs of E. M. O'Brien from shares of stock of Elliott-O'Brien Company, at Chehalis, Washington.

A valuation of par was placed upon the stock at the time of the administration, and was largely based on reports sent out by Mr. Elliott, the man-

ager of the store. He is very optimistic by nature; constantly seeing where profits can be realized, but as a matter of fact the store has never shown any profits since its operation. With a very small working capital he has carried a large stock of goods, running from thirty to forty thousand dollars, and as a consequence had a very large indebtedness outstanding against the store. On account of decline in values subsequent to the end of the War, a heavy loss was taken and during the last few months sales have been very light because of quiet times in the Northwest.

One of the assets of the corporation consists of personal indebtedness of Mr. Elliott on open account. This amounted to several thousand dollars, and is doubtless a complete loss, as he is at present without assets other than stock in the store. At the time of distribution of E. M. O'Brien's estate, the brother, C. H. O'Brien, accepted Elliott's notes for a considerable amount, and as you will readily see—he stands to lose the face amount of these notes in addition to the twenty-five shares of stock in the store.

Creditors of the company have become somewhat uneasy of late and have been pressing for payment of their accounts. Elliott has been trying to find a buyer but the best offers received was only for sixty cents on the dollar for stock and fixtures, which would just about pay the debts. During the last two or three weeks a specialist from Portland was obtained to assist in putting on a sale—with the expectation that the stock could be reduced to about

fifteen thousand dollars, when it was hoped to find some purchaser to take over the business as a going proposition. This sale has proven a disappointment, as it appears that there is not enough ready money in the community to make it a success. It would not surprise the writer at [113] any time to hear that some creditor had asked for a Receiver to be appointed, as there are several accounts considerably past due and the local Bank has demanded payment of its notes.

We are giving you this information so that you may advise the parties interested that they will probably be disappointed if they expect any return from their shares of this stock.

Yours very truly,

Asst. Cashier.

CLL:P.

D. G. ABEL,
Attorney at Law,
Chehalis, Wn.

April 11, 1921.

Dexter-Horton Trust and Savings Bk.,
Seattle, Washington.

Gentlemen:—

Attention Mr. C. L. LeSourd.

I received your letter of April 9th in regard to the Elliott-O'Brien Company and will say that I am perfectly at liberty to take any steps in this matter that you may desire.

I would suggest that you send me your files in this matter and since you have studied the matter

over for sometime, I would like to have your suggestions as to the best course to pursue at present.

From all the information that I have, the car of Mr. Elliott's is the only asset he has, outside of any possible interest he might have in the store.

Your suggestion that my charges be placed on a percentage basis is satisfactory to me, however, at present I could not estimate the amount that will be involved or what we might have a chance to recover. Fifteen per cent on the first thousand and five per cent on the balance obtained from Mr. Elliott will be satisfactory with me.

I understand that Mr. Elliott intends to leave here by the last of this month and I will proceed at once against him if you so desire.

Very truly yours,

Signed—D. G. ABEL.

AJS:DGA.

ELLIOTT-O'BRIEN CO.

Chehalis, Wash., April 13, 1921.

Mr. C. L. LeSourd,
Seattle, Wash.

Dear Sir:— [114]

Mr. Abel's letter to you will explain Mr. Elliott's attitude regarding Bill of Sale for Automobile. The only expression that I could get from him was that, while the matter in question might be a legal obligation, he did not consider it a moral one and consequently feels that he should be released from the notes in exchange for the automobile.

From the gist of his interview with Mr. Abel it appears that Mr. Abel took sides with him; that

may have been due in a measure to being a friend of his instead of ours.

I believe it will be necessary for you to come here for a day before Elliott leaves for Chicago in order to make the change of management and also to receive from him a complete detailed statement of the affairs of the company. I would suggest that as soon as we take inventory and make the trip. At that time we must get a complete and correct statement of the Company's indebtedness including all past due, now due and falling due wholesale bills. After you receive this you will know how to proceed in the event of any of the creditors demands for settlement; Elliott cannot see how, with the poor business we are doing, we are going to meet our obligations and I am just as pessimistic. Our sales have dropped to less than \$200 daily. As soon as Elliott leaves here, I can get along on less help, at least let two clerks go which will be the equivalent of the rent.

Will advise you before the completion of the inventory in order that you may plan to come down. With kind regards,

Yours very truly,

A. E. HART.

April 14, 1921.

Mr. Coram T. Davis,
c/o Carson, Pirie, Scott & Co.,
Chicago, Ill.

Dear Sir:—

Quite a serious situation seems to have developed

in connection with the Elliott-O'Brien Company at Chehalis. In order that we might have more reliable information that we were able to obtain from Mr. Elliott, we thought it wise to send Mr. A. E. Hart down to the store two or three weeks ago. Mr. Hart—you will remember, was connected with the Seattle office of Carson, Pirie, Scott & Co., for several years. Private letters have been received from Mr. Hart, and according to his estimate the store will not be able to more than pay its obligations.

A special sale has been put on this month, employing a specialist from Portland who guaranteed to unload \$20,000.00 worth of stock in thirty days. It appears that the sale has been a failure, largely for the reason that people are unable to buy because of quiet times in the Northwest, and in Chehalis in particular. The store has been advertised for sale—but no one appears to be especially interested in the matter, as Chehalis seems to have a very black eye in so far as the dry goods business is concerned. Mr. Hart thinks it will be impossible to avoid a Receivership unless someone is found within the near future to buy the store as a going proposition.

[115]

You probably remember that we are holding \$4500.00 of Elliott's personal notes in favor of C. H. O'Brien, which are collateraled by one-half of the stock in the store. Just before C. H. left New York for Europe he wired—asking us to make demand upon Elliott for the sale of his Automobile and application of the proceeds upon these notes.

This demand was made at once, Elliott will only turn over the car on condition that we cancel and return to him all the notes. He takes the position that while he may be legally liable upon these notes, he feels no moral liability, as the O'Briens have obtained considerable commissions on sales to the store during the last few years. Evidently what he wants is for someone to force him into involuntary bankruptcy, and thus clear him of his debts.

By returning the notes we could obtain the car, which is probably worth between \$800.00 or \$1000.-00. I hardly feel that I am authorized to compromise on this basis without receiving your advice. It is our belief that this is about the only way Mr. C. H. O'Brien will obtain anything from the whole proposition.

During the administration of the estate, Elliott made different payments totaling \$2000.00 on account of his personal note in favor of E. M. O'Brien. He now claims that these amounts were taken from the assets of the corporation and charged upon the books to his personal account. He has been talking with his bankers and lawyer and they have led him to believe that the heirs of E. M. O'Brien will be required to return this amount in the event that the creditors could not be paid in the liquidating of the store. We can hardly believe that the Courts will take any such position in this matter, as at that time the corporation seemed to have a surplus account, considerably more than was taken by Mr. Elliott, and whatever amounts were taken out by him were not distributions of the capital.

You will see by what we have stated above that Elliott has not only mismanaged the store, but is now trying to avoid payment of his personal obligation. He wishes to get away from the store by the end of this month, stating that he going to accept a position as salesman for Carson, Pirie, Scott & Co. Whatever action we take in this matter must be taken at once. Upon receipt of this letter wish you would wire me at our expense, stating whether you think we should surrender the \$4500.00 of notes upon delivery of the Automobile.

Thanking you for your consideration of this matter, and an early reply, we are

Yours very truly,

Asst. Cashier.

CLL:P.

D. G. ABEL,
Attorney at Law,
Chehalis, Wn.

April 14, 1921.

Dexter-Horton Trust & Savings Bk.,
Seattle, Wn.

Gentlemen:—

Attention Mr. C. L. LeSourd.

I received your letter of April 13th, and in order to keep you advised as far as I know of the steps Mr. Elliott is taking will say that he is now conducting a sale of his household goods and also has [116] his automobile up for sale.

His wife expects to leave this City next Sunday and he is to leave shortly thereafter.

Very truly yours,

D. G. ABEL.

AJS:DGA.

April 16, 1921.

Mr. D. G. Abel,
Attorney at Law,
Chehalis, Wash.

Dear Sir:—

Kindly accept our thanks for your letter of April 14th, regarding Mr. Elliott's plans to leave your City. Something definite will be done in connection with the Automobile the first of the week.

I am awaiting advice from Chicago relative to this matter, not caring to take the responsibility without approval from Mr. O'Brien's home office.

Yours very truly,

Asst. Cashier.

CLL:P.

April 18, 1921.

The Mottman Mercantile Co.,
Olympia, Wash.

Gentlemen:

Have received your offer of \$2500.00 for shelving and fixtures of Elliott-O'Brien Company, at Chehalis. We have not wired reply because we are not in a position to sell the fixtures without conferring with Mr. Elliott, Manager of the store. In any event we would not care to dispose of the fixtures

before some disposition was made of the stock of merchandise.

The writer expects to go to Chehalis some time this week, and will advise you of our decision at that time.

Yours very truly,

Asst. Cashier.

CLL:P. [117]

April 18, 1921.

Mr. W. F. Elliott,
c/o Elliott-O'Brien Co.,
Chehalis, Wash.

Dear Sir:

Your letter offering to turn over a bill of sale to your Automobile in favor of C. H. O'Brien upon cancellation of your notes was duly received, and has remained unanswered awaiting advice from Mr. Davis, of Chicago, as to his wishes in the matter. When Mr. O'Brien went away on his trip—he left the settlement of matters at Chehalis in the hands of Mr. Davis and the writer. Have just received the following telegram from Chicago:

“Elliott's position reference notes seems unreasonable, especially in view O'Brien's many years loyal support both financial and moral. Think Elliott should gladly volunteer sale of personal luxuries to offset his note. Unless he has this spirit fair play cannot conceive he is type of man my firm would want to employ.”

Under the circumstances it seems to me the very best thing that you could do would be to turn over

the car at once and apply the proceeds on the notes which we hold. Unless this is done, you will probably be handicapped in your new relation with Carson, Pirie, Scott & Co. Will you please advise us at once what action we can expect from you in this matter.

A telegram was received today from the Mottman Mercantile Company, of Olympia, offering \$2500.00 for shelves and fixtures of Elliott-O'Brien Co., with the understanding that we would convey same with free title. This would mean paying up for Cash Register, and would really only net about \$1900.00 as I understand that there is a balance of \$500.00 due on the Register.

I do not see how *can* can dispose of the fixtures and make delivery of same until the stock of merchandise has been sold. We might entertain some proposition to sell the fixtures and make delivery only upon closing out of the stock. Have been thinking that I might go down to Chehalis one day this week, and we could dicuss this matter at that time.

If you think there is any urgency about accepting this offer from Olympia, you might telephone me tomorrow.

Very truly yours,

Asst. Cashier.

CLL:P.

WESTERN UNION TELEGRAM.

Olympia, Washington 8:28 A. Apl. 18, 1921.

Mr. LeSourd,

c/o Dexter Horton and Co. Bankers, Seattle,
Wash.

Looked over stock of Elliott OBrien Company Chehalis yesterday will give you twenty five hundred dollars cash for stock shelving and fixtures subject to clear title and immediate acceptance wire answer.

THE MOTTMAN MERC CO. [118]

THE MOTTMAN MERCANTILE COMPANY.

Olympia, Washington, 4-19-21.

Mr. C. L. LeSourd,

Seattle, Wn.

Dear Sir:

Judging from the tone of your letter of yesterday the message must have been somewhat garbled in its transmission and to avoid any misunderstanding we want to explain at this time, that we are willing to pay for stock-shelving—and fixtures \$3000 to \$3500, three thousand to thirty five hundred dollars cash.

The stock of goods is badly shot to pieces and while Mr. Elliott has some ideas that the stock is worth a lot of money, close examination of the same brings to light the exact opposite.

Yours very truly,

MOTTMAN MERC CO.

Geo. A. Mottman.

April 20, 1921.

The Mottman Mercantile Company,
Olympia, Wash.

Gentlemen:

Cannot say that we understand your proposition any more clearly after receiving your letter. According to the best information we can obtain there is a stock of merchandise in the store of approximately \$20,000, value, with fixtures on hand worth from three to four thousand dollars. If your offer of from \$3000.00 to \$3500.00 is for the entire merchantable stock and fixtures—it will not be considered for a moment.

The writer expects to be in Chehalis Friday morning and if you care to send a representative there to make an offer for the stock, you may do so, but unless the offer is largely in excess of the one mentioned, it would be a waste of your money to send anyone down.

Yours very truly,

Asst. Cashier.

CLL:P.

April 23, 1921.

Mr. Coram T. Davis, Atty. at Law,
#300 West Adams Street,
Chicago, Ill.

Dear Mr. Davis:

Have just received your letter of April 19th, and am very glad to have an expression of your ideas concerning the collection of notes from W. F. Elliott. The telegram which you sent a few days ago fur-

nished me with just the leverage I desired to use upon Mr. Elliott. Immediately upon its receipt I communicated its contents to Mr. Elliott and then made a personal visit to Chehalis yesterday. [119]

Without much trouble Mr. Elliott turned over to us a bill of sale for the Automobile which I immediately recorded. Title now rests in the name of C. H. O'Brien, and the Power of Attorney which I have permits transfer to purchaser.

We are sending a young man from the Bank today to Chehalis, to drive the car here, as we fear there may be some legal complications if the machine is allowed to remain there. The automobile is an Overland Sedan, last year's model. Elliott thinks it should be worth approximately \$1000.00 but has been unable to obtain any such offer for it, and we are inclined to think that price a little too high. Second hand cars are rather a drug upon the market at the present time. We will endeavor to realize as much from the car as possible, as we believe that is all Mr. O'Brien will obtain from his notes.

Mr. Elliott did not require the surrender of the notes, so that Mr. O'Brien will be in a position to enforce payment later on if Mr. Elliott has anything with which to pay. We are inclined to believe that for the present Mr. O'Brien had better accept what he receives from the car and forget the rest.

Spent most of the day taking off from the Elliott O'Brien Company's books a list of their indebtedness, which seems to be in the neighborhood of \$19,000.00. An inventory of the merchandise stock is to be taken beginning tomorrow, and this will

enable us to determine just what is the proper procedure for the store to take. If it seems impossible for the store to pay its debts we will suggest that all stock be turned over to the creditors at once.

Yours very truly,

Asst. Cashier.

CLL:P.

April 23, 1921.

Mr. A. E. Hart,
c/o Elliott-O'Brien Co.,
Chehalis, Wn.

Dear Sir:

After leaving the store yesterday, I called at the Coffman-Dobson Bank, but was unfortunate in not being able to see Mr. Coffman. I had a talk with Mr. Donahue, the Vice President, regarding matters concerning the store. I thought it wise to let him know that matters were in a serious shape, so that they would not expect application on their notes of every dollar that is taken in by the store. I told him that there were many other creditors who would have to be satisfied if the store was to continue in operation, but that all intended to take care of the Bank's obligation just as rapidly as possible under the circumstances. [120]

After leaving the store it occurred to me that I had not written down among the obligations the unpaid balance due on the Cash Register. When convenient, drop me a note telling me amount of unpaid balance.

Have received your letter containing statement

of Bills Due, but have not had time to go over them carefully. Will be very much interested in receiving your figures of inventory, so we may see just where we stand financially.

With personal regards, I am,

Sincerely yours,

Asst. Cashier.

CLL:P.

ELLIOTT-O'BRIEN CO.

Chehalis, Wash., April 28th, 1921.

Mr. C. L. LeSourd,

Dexter Horton Trust & Savings Bank,
Seattle, Wash.

Dear Sir:

Mr. Elliott took his departure this morning. I have a statement of our Assets and Liabilities to date to submit to you in person. I had not intended going to Seattle this week, but it is important that I should do so in order to go into details that cannot be satisfactorily explained by correspondence.

Mr. Jerome Walters of Aberdeen called last evening again in regard to buying the stock and fixtures and has made us an offer. I believe after I have gone into the matter with you we may be able to arrange with the creditors whereby they would receive 75c instead of a possible 25c; in the event of it going into a Receiver's hands.

I will not leave Chehalis until 3 a. m. Sunday morning as I have to be here for the wind up of Saturday business; we keep open until 9 p. m. I will call on you on Monday morning next.

Yours very truly,

A. E. HART. [121]

Page 4-TRIAL BALANCE. THURSTON, J. B.

1921.	Stock (Brt Ford)	Wise Recd.	Expense & Pmt.	Total	Wise Due	Wise Net Due	Total	Total Sales	Stock on hand	Rent	Water & Light	Heating	Insurance	Taxes	Delivery & Toll.	Stationery & Postage
Jan.	27642.25	2550.16	117.68	2598.04 (26078.68)	2570.56	7116.15	11078.63	6026.22. (58644.84)	26271.29	125.00 (1256.00)	34.98 (251.76)	(60.80)	(425.40)	(29.00)	129.78 (568.40)	54.24 (470.98)
Feb.	24371.29	2574.15	146.24	2480.39	2426.14	9291.39	12727.62	4626.94	26545.92	125.00	42.25	26.32			64.04	122.07
Mar.	24544.92	4470.35	125.69	4603.93	4789.79	9527.45	14316.24	4717.19	27047.41	115.00	25.60	26.32			79.20	64.87
April 26	27847.31 14010.29	249.84	19.69	249.83	6693.19	3923.42	12616.61	8977.46	14815.29	150.00	24.00	13.63			67.44	134.64

PAGE 5 TRIAL BALANCE THURSTON'S EX. B

MANUFACTURING										Cash on hand & in bank	
1921	Salaries	Advertising	Supplies Allocations	Interest	Total Expenses	Discounts	Gross profits Made	Total Gross profits	Net Profits	Net Sales	Net Savings
Jan.	1134.23 (12424.23)	657.60 (3252.80)	60.59 (718.05)	111.39 (1149 .64)	2326.78 (20761.98)	44.74	1868.05	2032.79	253.93	11704.98	6000.00 (1571.20) (1227.65)
Feb.	1002.97	97.32	61.68	40.96	1568.49	11.29	1291.08	1402.36	144.13	11603.85	1400.00 (1876.20) (1942.25)
March	1135.95	41.40	26.70	37.50	1583.64	4.81	1416.15	1419.96	163.88	11444.87	800.00 (846.00) (825.20)
April 1	1272.66	1072.33	81.68	58.87	2906.29	16.74			6499.90	2988.97	2000.00 (124.00 (28) (209.99) (27)

3346.

Elliott-O'Brien,
Trustee's Exhibit "C."

In Account With
CARSON, PIRIE, SCOTT & COMPANY.
300 West Adams St.

Chicago, 7-19-21.

Elliott-O'Brien Co.

Chehalis, Wash.

Balance Jan. 1st, 1921.....	6590.47
Bal. due on remittance of 2/24/21 Int. for overtime...	3.64
Bal. due on remittance of 2/4/21 Credit used twice....	2.25
Bal. due on remittance of 4/29/21 Int. for overtime...	17.59
Bal. due on remittance of 3/5/21 Int. for overtime....	5.37
Bal. due on remittance of 4/1/21 Int. for overtime....	8.19

1921	Net Cash	2% 10 days	6% 10 days	
Jan. 6		16.91		
7		233.76		
8		9.85	.65	
12	11.25			
13	15.91			
17		210.93		
		5.32		
Mar. 8		61.50		
24		33.51		
31		30.48		
	Crd. Mdse.			
Jan. 5		14.62		
6		21.14		
18	25.97			
13	9.00			
	<hr/>	<hr/>	<hr/>	<hr/>
	7.81	566.50	.65	559.43
				<hr/>
				7186.85

	Crd. Cash.			
Jan. 6	265.50	233.76	.65	7186.00
Jan. 25	265.50			
27	495.55			
Feb. 4	517.54			
24	661.59			
Mar. 5	715.80			
Apr. 1	589.66			
25	500.00			
29	508.47			4254.11
				<hr/> 2932.74
		Int. on past due acct.		29.44
				<hr/> 2962.18

[124]

Trustee's Exhibit "G."

COPY.

#3346.

In the Superior Court of the State of Washington,
in and for Lewis County.

BEE-NEGGET PUBLISHING CO., a Corpora-
tion,

Plaintiff,

vs.

ELLIOTT-O'BRIEN CO., a Corporation,

Defendant.

ORDER.

WHEREAS, it appears to the Court, from the complaint of the plaintiff, and the answer of the defendant filed herein, that the defendant is a corporation and is insolvent, and that, therefore, its assets are a trust fund for the benefit of creditors equally and ratably, and that there is imminent danger of

their not being so applied, and of certain creditors obtaining priority over other creditors, and that plaintiff is a creditor of the defendant and brings this action on behalf of all creditors similarly situated, plaintiff seeking no preference or priority; that a necessity exists for the appointment of a receiver of the assets of the defendant for the purpose of winding up the assets of the defendant and properly apply the assets and it further appearing to the Court that George R. Walker is a fit and proper person to act as such receiver; that the assets of the defendant are of the reasonable value of \$12,000.

IT IS NOW ORDERED:

That George R. Walker be, and he is hereby appointed as receiver of the assets of the defendant and directed to forthwith take possession and control of the same and to return to this court as soon as possible an inventory of the said assets and he shall continue to operate [125] said business until further orders of this court, keeping the same a going business in order to effect a more advantageous sale thereof, if such sale be found advisable, and such receiver shall in all respects comply with the law and order of this court, and he shall take oath as prescribed by law and file herein, as required by law a good and sufficient bond in the penal sum of \$1500.00, to be approved by the Court, before entering upon his duties.

At the time of the entry of this order appeared Hull and Murray, attorneys for plaintiff, and D. G. Abel, attorney for defendant.

By the Court, May 7th, 1921.

W. A. REYNOLDS,
Judge. [126]

EXHIBIT "D," and in lieu of "D," as follows:

Statements rendered by Carson, Pirie, Scott & Co., of its account with bankrupt, as follows:

9-23-1920.

Interest due for overtime on bills of December and
January paid today, amount.... 42557.08—63.14
Time taken—260 days.

Nov. 5, 1920.

11-12-20—paid 11-25 int. for overtime..... 24.57

11-12-20—paid 11-10 int. for overtime..... 50.25

12-2-20.

Interest due as for overtime on bills of March paid
today—Amount 4-52—32.65
Time taken—253 days. [126½]

Trustee's Report

NAME	Claim filed	Payments made less purchases		Percentage of debt paid
Bel. G.	(100.00)	1/1/21		
Bel. August Co.	(6.00)			
Bel. Pross Co.	39.98	0 x 166.40	124.98	75%
Bel. Niggett Pub Co.	274.25	339.50 x 503.75	574.00	(20%) 68%
Bel. Bros Bag Co.	143.75	101.25 x 278.75	236.25	62%
Bel. Haffin's Inc.	16.36	0 x 16.36		0
Bel. Hinkelspiel Co.	205.15	0 x 219.81	14.66	7%
Bel. Hinkelspiel & Co.	(2494.11)	2714.59 x 1496.77	1717.26	(9%) 48%
Bel. Hart & Bros. B	358.90	0 x 358.90		0
Bel. Levi Strauss & Co.	234.03	0 x 242.03	800.00	31%
Bel. Jones & Sons. James	9.19	6.13 x 3.06		0
Bel. Jones Bros Inc.	521.00	0 x 559.75	38.75	7%
Bel. Love, Warren & Monroe	59.25	24.49 x 267.34	232.58	80%
Bel. More Dry Goods Co.				
Bel. Welton	1280.58	0 x 1307.68	27.10	2%
Bel. Jones Bros	56.50	0 x 337.75	280.25	83%
Bel. Morrow & Wagner	178.50	0 x 283.50	105.00	40%
Bel. Marshall Field & Co.	697.83	0 x 697.83		0
Bel. Knott Silk Co.	406.49	0 x 409.61	29.49	7%
Bel. Lino. S.	17.50	0 x 17.50		0
Bel. North Coast Power Co.	33.80	0 x 33.80		0
Bel. Royal Worcester Carpet Co.				
Bel. Battle Paper Co.	143.68	158.25 x 161.16	175.75	(9%) 55%
Bel. Wabacher Bros	11.70	0 x 11.70		0
Bel. Standard Broom Co.	66.00	16.50 x 132.	82.50	52%
Bel. Standard Broom Co.	121.00	0 x 121.00		0
Bel. Standard Paper Co.	21.49	10.04 x 21.49	10.04	31%
Bel. Ankman-Kirchima Co.	(652.50)			
Bel. Win City Feed Co.	2.13	0 x 3.66		0
Bel. Vogue Merchandise Co.	177.86	0 x 441.23	263.37	59%
Bel. Western Dry Goods Co.	991.85	904.66 x 1016.71	929.52	48%
Bel. Wacku King & Co.	48.50	0 x 48.50		0
Bel. Whens Co. A.	23.32	0 x 23.32		0
Bel. Potany Worsted Mills	164.39	0 x 164.30		0
Bel. Louis Cohen	105.00			
Bel. Mariasner Pub Co.	309.04			
Bel. Hoffman Dobson Bank	1800.00	5500 x 800.00	4500.00	(67%) 71%
Bel. Carson Pirie Scott & Co.	2932.74	6590.47 x 667.11	4324.84	(55) 60%

4 accts listed

5 accts average per cent 30%

Payments to others 4844.50
8824.84
13669.34

50 % of all payments went to Bank and Carson Pirie & Scott.

Respondent's Exhibit No. 1.

#3346.

WHOLESALE ACCOUNTS.

January, 1921.

Carson, Pirie, Scott & Co.....\$ 489.02

Carson, Pirie, Scott & Co. (February).... 1222.51

March, 1921.

Fleischner-Mayer & Co..... 665.44

Carson, Pirie, Scott & Co..... 485.10

Western Dry Goods Co..... 491.34

B. Hart & Bro..... 40.05

Levi Strauss Co..... 55.25

H. W. Gossard Co..... 16.29

R. Kohara Co..... 17.04

R. Kohara Co..... 6.28

Moss Bros..... 34.50

Moss Bros..... 23.00

Schwabacher Bros..... 33.00

Love-Warren-Monroe Co..... 6.83

Love-Warren-Monroe Co..... 180.91

Love-Warren-Monroe Co..... 1.56

Bemis Bros. Bag Co..... 62.50

Ulius Bros. 92.75

Garrison-Wagoner Co. 6.69

S. L. Hoffman Co..... 40.35

Louis Cohen Co. 105.00

S. G. Dress Co. 66.50

Samuel Landau 100.00

Vogue Merchandise Co..... 18.22

April, 1921.

Carson, Pirie, Scott Co.....	\$ 1640.60
Fleischner-Mayer Co.	458.58
Western Dry Goods Co.....	659.10
Lees Brothers	472.50
Marshall-Field & Co.....	499.30
Landesman-Hirschheimer Co.	367.00
Vogue Mdse. Co.....	35.63
Vogue Mdse. Co.....	39.05
Vogue Mdse. Co.....	71.01

[128]

Royal Worcester Co.....	116.38
Nonatuck Silk Co.....	239.06
H. W. Gossard Co.	256.74
Walton N. Moore D. G. Co.....	469.59
Botany Worcester Mills	93.89
Santag Hilder Bro.....	12.57
Schwabacher Bros.....	33.00
Samuel Landua	49.50
Manson & Wegman.....	178.50
Standard Broom Co.....	44.00
Samuel Nemino	17.50
Luckel King & Cake Soap Co.....	48.50
Designer Publishing Co.....	15.42
Bemis Bag Co.	50.00
F. M. Slack	1.26

May, 1921.

Fleischner-Mayer Co.	\$ 1216.54
Carson, Pirie, Scott & Co.....	86.82
Landesman-Hirschheimer Co.	285.50
Western Dry Goods Co.....	317.16
Royal Worcester Corset Co.....	8.81
Lees Bros.....	41.00

Walton N. Moore D. G. Co.....	709.41
Samtag & Hilder Bros.....	55.46
Claffin, Inc.....	16.36
Botany Worsted Mills.	70.50
Marshall-Field & Co.....	198.53
Nonatuck Silk Co.....	34.69
Nonatuck Silk Co.....	78.50
Nonatuck Silk Co.....	27.87
B. Hart & Co.....	33.15
Levi Strauss & Co.	173.54
H. W. Gossard Co.....	9.48
L. Dinkenspeil	100.00
L. Dinkenspeil	104.25
Love-Warren-Monroe Co.....	59.25
Seattle Paper Co.....	7.37

June, 1921.

Fleischner-Mayer Co.....	35.00
Carson, Pirie, Scott & Co.....	63.99
Royal Worcester Corset Co.....	15.74
Levi Strauss & Co.....	5.24

SUNDRY BILLS.

Advocate Printing Co.....	\$ 84.00
Bee Nuget Printing Co.....	420.50
Taxes—1920	515.44
Kvarno Overland Co.....	36.75
Coffman-Dobson Bank & Trust Co.....	3500.00
Due Bank.....	297.04

Grand Total.....\$18,215.33

Respondent's Exhibit No. 2.

3346.

ELLIOTT-O'BRIEN CO.

Chehalis, Wash., December 31st, '20.

ASSETS:

Inventory	27862.25 (net)	
Book accounts	1894.07	
Fixture accounts	3520.22	
Unexpired insurance ..	235.00	
Wrapping paper	15.00	
Stationery	50.00	
Claims pending	5.20	
Coupons (Standard) ..	1.80	
Baby bonds—2 @ 4.35	8.70	
<hr/>		
Total.....		\$33592.24
Depreciation on fix-)		
tures	\$316.82)	610.89
Wrote off bad accounts	294.07)	
<hr/>		
Total.....		\$32981.35

LIABILITIES:

Owe for merchandise.....	12958.11	
Bills payable Coffman-Dobson Bank &		
T. Co.....	2500.00	
Bills payable Coffman-Dobson Bank &		
T. Co.....	2000.00	
Bills payable Coffman-Dobson Bank &		
T. Co.....	1000.00	
Owe bank	292.89	
<hr/>		
		18751.00
Net worth		14230.35
<hr/>		
Grand total.....		32981.35
(Cap. Stock 15 M.)		

Petition for Allowance of Appeal.

S. G. Climenson, as trustee of Elliott-O'Brien Co., a corporation, bankrupt, conceiving himself aggrieved by the judgment and order of the Court made and entered herein the 13th day of March, 1922, in the above-entitled cause, for the reasons set out in his assignment of error filed herein, hereby appeals from said Judgment and Order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays this Honorable Court to grant him an order allowing an appeal from said judgment and said order to the said United States Circuit Court of Appeals for the Ninth Circuit, and prays that transcript of the record, proceedings and papers upon which decision and Judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

NELSON R. ANDERSON,
Attorney for S. G. Climenson, Trustee.

Order Granting Appeal.

S. G. Climenson, as trustee of Elliott-O'Brien Co., a corporation, bankrupt, having heretofore filed its petition for appeal and assignments of error, and having given notice to said claimants, namely, Carson, Pirie, Scott & Co., Coffman-Dobson Bank & Trust Co., and Bee Nuggett Publishing Co., and the Court having duly [131] considered the above

and foregoing Petition and being fully advised in the premises,—

IT IS ORDERED that the appeal prayed for be, and the same hereby is granted, and it is further ordered, that a transcript of the record be transmitted by the Clerk to the Clerk of the Appellate Court.

Done in open court this 13th day of March, 1921.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Mar. 13, 1922. [132]

Amended Assignments of Error.

Comes now S. G. Climenson, as trustee of Elliott-O'Brien Co., a corporation, bankrupt, and assigns the following errors committed by the Court during the trial and in the rendition of the judgment and entering the order in the above-entitled matter, entered March 13, 1922, allowing the claims of Carson, Pirie, Scott & Co., and Coffman-Dobson Bank & Trust Co., upon which said Trustee will rely in the Appellate Court:

I.

The Court erred in approving the ruling of the Referee allowing the claim of, and overruling the objections of the trustee to the claim of, Carson, Pirie, Scott & Co. on the ground of preferences received contrary to the Bankruptcy Act prohibiting preferences to creditors.

II.

The Court erred in approving the ruling of the

Referee allowing the claim of, and overruling the objections of the trustee to the claim of, Coffman-Dobson Bank & Trust Co. on the ground of preferences [133] received contrary to the Bankruptcy Act prohibiting preferences to creditors.

III.

The Court erred in approving the finding of fact, if it be a finding, made by the Referee as follows:

That the inventory showing was very good, \$26,371.39, and, while *that its* claimant, Carson, Pirie, Scott & Co., was very large, yet the inventory would seem sufficient to pay it, and that, together with the manager's contention that he would reduce the stock, pay its debts, which he did actually proceed to do, might very easily lead claimant to believe that the manager was reducing all debts and not merely its debts; because same is not supported by, and is contrary to, the evidence.

IV.

The Court erred in approving the finding of the Referee, if it be a finding, as follows:

I do not believe that the claimant had knowledge of the insolvent condition of the bankrupt or sufficient reason to believe that it was receiving a preference; because same is not supported by, and is contrary to, the evidence.

V.

The Court erred in approving the finding of the Referee, if it be a finding, as follows:

Unless claimant had knowledge of the purposes of the dominant stockholder to close out the business it was not likely to suspect insolvency; because

same is not supported by, and is contrary to, the evidence.

VI.

The Court erred in approving the finding of the Referee, if it be a finding, as follows:

The case at bar is distinguished from the cases relied on by the trustee in that the creditor was informed by the manager that [134] he could pay his debts by reducing the stock; because same is not supported by, and is contrary to, the evidence.

VII.

The Court erred in approving the finding of the Referee, if it be a finding, as follows:

That Dan Coffman, cashier of Coffman-Dobson Bank & Trust Co., stated at page 145 of the transcript that the bank was liquidating as any other bank was, and if they had cleared up their notes the Bank would likely have accommodated them again; because same is not supported by, and is contrary to, the evidence.

VIII.

The Court erred in finding that said Carson, Pirie, Scott & Co. did not know or believe or have reasonable cause to believe that the transfers would effect a preference; because same is not supported by, and is contrary to, the evidence.

IX.

The Court erred in not finding that Carson, Pirie, Scott & Co. believed or had reasonable cause to believe that a preference was effected by payments made on account as shown by the evidence.

X.

The Court erred in not finding that Carson, Pirie, Scott & Co. believed or had reasonable cause to believe that a preference was effected by payments made on account by the failure of Carson, Pirie, Scott & Co. to introduce correspondence between it and the bankrupt, and the suppression of same, thereby establishing an inference of fact and a presumption of law that they knew, believed or had reasonable cause to believe a preference was effected.

XI.

The Court erred in finding that said Coffman-Dobson Bank & Trust Co. did not know or believe or have reasonable cause to believe that the transfers would effect a preference; because same is [135] not supported by, and is contrary to, the evidence.

XII.

The Court erred in not finding that Coffman-Dobson Bank & Trust Co. knew, believed or had reasonable cause to believe that a preference was effected by payments made on account as shown by the evidence.

XIII.

That the Court erred in approving the ruling of the Referee and in allowing the claim of, and not sustaining the objections of the trustee to, claim of Carson, Pirie, Scott & Co., for preferences received contrary to the laws of the State of Washington prohibiting insolvent corporations from preferring creditors.

XIV.

The Court erred in approving the ruling of the Referee and allowing the claim of Carson, Pirie, Scott & Co., because the facts found do not, according to the laws of the State of Washington prohibiting insolvent corporations from preferring creditors, sustain the judgment.

XV.

That the Court erred in approving the ruling of the Referee and in allowing the claim of, and not sustaining the objections of the trustee to, claim of Coffman-Dobson Bank & Trust Co., for preferences received contrary to the laws of the State of Washington prohibiting insolvent corporations from preferring creditors.

XVI.

The Court erred in approving the ruling of the Referee and allowing the claim of Coffman-Dobson Bank & Trust Co., because the facts do not, according to the laws of the State of Washington prohibiting insolvent corporations from preferring creditors, sustain the judgment. [136]

XVII.

The Court erred in not giving judgment in favor of the Trustee and against Carson, Pirie, Scott & Co., upon the facts found containing all the elements of a preference under the laws of the State of Washington wherein insolvent corporations cannot prefer creditors no matter what the good faith of the creditor may be; knowledge, belief or reasonable cause to believe upon the part of a creditor that a preference was received is immaterial.

XVIII.

The Court erred in not giving judgment in favor of the trustee and against Coffman-Dobson Bank & Trust Co., upon the facts found containing all the elements of a preference under the laws of the State of Washington wherein insolvent corporations cannot prefer creditors no matter what the good faith of the creditor may be; knowledge, belief or reasonable cause to believe upon the part of a creditor that a preference was received is immaterial.

WHEREFORE said trustee prays that said decision, judgment and order be reversed and that said District Judge may be directed to enter a judgment and order sustaining the objections of the Trustee to the claims of said creditors.

NELSON R. ANDERSON,

Attorney for S. G. Climenson, Trustee.

[137]

[Endorsed]: Filed May 9, 1922, F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. [137a]

Stipulation as to Record on Appeal.

IT IS HEREBY STIPULATED AND AGREED, by and between counsel herein, that the record on appeal shall constitute the following papers and none other, and the Clerk, in preparing the record shall omit all captions, endorsements, acceptances of service and verifications, except file-marks:

1. Claim of Carson, Pirie, Scott & Company.
2. Claim of Coffman-Dobson Bank & Trust Company.

3. Objections of the trustee to claim of Carson, Pirie, Scott & Co.
4. Objections of the trustee to claim of Coffman-Dobson Bank and Trust Co.
5. Answer of Carson, Pirie, Scott & Co.
6. Order of Referee.
7. Petition of review by trustee.
8. Certificate of Referee.
9. Order of Judge Cushman.
10. Opinion of Judge Cushman. [139a]
11. Abstract of testimony as per copy attached.
12. Petition and order allowing appeal.
13. Assignments of errors.
14. Citation.
15. Trustee's Exhibit "A"; part of Trustee's Exhibit "B" as per copy attached; Trustee's Exhibit "C"; that part of Trustee's Exhibit "D," and in lieu of "D" as follows:

Statements rendered by Carson, Pirie, Scott & Co. of its account with bankrupt as follows:

9-23-1920.

"Interest due as for overtime on bills of December and January paid to-

day, amount\$2557.08—63.14

Time taken 260 days."

Nov. 5, 1920.

11-12-20—Paid 11-25 int. for overtime...34.57

11-12-20—Paid 11-10 int. for overtime...50.25

12-3-20.

Interest due as for overtime on bills of March
paid today—Amount.....14.51—32.65

Time taken 253 days.

Trustee's Exhibit "G" and "I."

Respondent's Exhibit #1 as per copy attached and

Respondent's Exhibit #2.

IT IS FURTHER STIPULATED AND AGREED, that a transcript of the testimony certified to by the Referee and all exhibits of trustees and respondents may be sent down to the Circuit Court of Appeals as part of the record and need not be printed, and may be used upon said appeal and referred to by either party upon the presentation of said cause in the Circuit Court of Appeals, provided, however, that this stipulation shall not be deemed a waiver of any objections to the competency or admissibility by counsel to the oral evidence on said exhibits. [139b]

Dated this 28th day of March, 1922.

NELSON R. ANDERSON,

Attorney for Trustee,

GEO. N. WOODLEY and

McCLURE & McCLURE,

Attorneys for Carson, Pirie, Scott & Co.

H. H. HULL and

J. EMMONS,

Attorneys for Coffman-Dobson Bank & Trust Co.

[Indorsed]: April 4, 1922. [140]

Citation.

The President of the United States to Carson, Pirie, Scott & Co., a Corporation, Coffman-Dobson Bank & Trust Co., a Corporation, Bee Nuggett Publishing Co., a Corporation, and to George N. Woodley, Walter A. McClure and A. A. Hull, Their Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office for the United States District Court Court for the Western District of Washington, Southern Division, in a cause where S. G. Climenson, as Trustee of Elliott-O'Brien Co., a corporation, bankrupt, is appellant, and you are appellees, then and there to show cause, if any there be, why the judgment and decree mentioned in said appeal should not be corrected, and speedy justice done to the parties in that behalf. [140a]

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 13th day of March, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Mar. 13, 1922. [141]

[Endorsed]: No. 3862. United States Circuit Court of Appeals for the Ninth Circuit. In the

Matter of Elliott-O'Brien Company, a Corporation, Bankrupt. S. G. Climenson, as Trustee of Elliott-O'Brien Company, a Corporation, Bankrupt, Appellant, vs. Carson, Pirie, Scott & Company, a Corporation, Coffman-Dobson Bank & Trust Company, a Corporation, Bee Nuggett Publishing Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed April 11, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday the ninth day of May, in the year of our Lord one thousand, nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable ROBERT S. BEAN, District Judge.

No. 3862.

In the Matter of ELLIOTT-O'BRIEN COMPANY,
a Corporation, Bankrupt.

S. G. CLIMENSON, as Trustee of Elliott-O'Brien
Company, a Corporation, Bankrupt,
Appellant,

vs.

CARSON, PIRIE, SCOTT & COMPANY, a Cor-
poration, COFFMAN, DOBSON BANK &
TRUST COMPANY, a Corporation, BEE-
NUGGETT PUBLISHING COMPANY, a
Corporation,

Appellees.

**Order Dismissing Appeal of S. G. Climenson from
Order Allowing Claim of Bee-Nuggett Publish-
ing Company, etc.**

This matter coming on regularly for hearing upon stipulation of counsel for the respective parties this day filed, and the Court being fully advised in the premises,—

IT IS ORDERED that the appeal taken by S. G. Climenson, as trustee of Elliott-O'Brien Company, a corporation, bankrupt, from the order allowing the claim of the Bee Nuggett Publishing Company be, and the same is hereby dismissed as to said Bee Nuggett Publishing Company without cost, and without prejudice to the appeal taken as to Carson, Pirie, Scott & Company, and Coffman-Dobson Bank & Trust Company.

IT IS FURTHER ORDERED that the appellant be and hereby is allowed to file an amended assignment of errors and that the same may be printed in lieu of the assignment of errors heretofore made and filed.

In the United States Circuit Court of Appeals for
the Ninth District.

No. 3862.

S. G. CLIMENSON, as Trustee,

Appellant,

vs.

CARSON, PIRIE, SCOTT & CO., et al.

Appellee.

Stipulation for Dismissal of Appeal as to Bee-Nuggett Publishing Company, and for Filing of Amended Assignments of Error, etc.

WHEREAS, the trustee herein has taken an appeal from the order entered herein on March 13th, 1922, sustaining the claims of Carson, Pirie, Scott & Co., Coffman-Dobson Bank & Trust Co., and Bee Nuggett Publishing Co., and

WHEREAS, the trustee desires to dismiss appeal from the order allowing the claim of Bee Nuggett Publishing Co., and desires only to prosecute the appeal from the allowance of the claims of Carson, Pirie, Scott & Co., and Coffman-Dobson Bank and Trust Co.—

IT IS STIPULATED AND AGREED that the appeal taken herein from the order allowing the

claim of Bee-Nuggett Publishing Co. shall be dismissed without prejudice to the appeal taken as to Carson, Pirie, Scott & Co., and Coffman-Dobson Bank & Trust Co.

IT IS FURTHER STIPULATED that trustee may file a new assignment of error as per copy attached, and that same may be made part of the record and printed in lieu of the assignment of error heretofore made and entered on March 13, 1922.

Dated this 22d day of April, 1922.

NELSON R. ANDERSON,

Attorney for S. G. Climenson, Trustee.

GEO. N. WOODLEY and

McCLURE & McCLURE,

Attorneys for Carson, Pirie, Scott & Co.

H. H. HULL and

J. E. MURRAY,

Attorneys for Coffman-Dobson Bank & Trust Co.
and Bee Nuggett Publishing Co.

[Endorsed]: No. 3862. United States Circuit Court of Appeals for the Ninth Circuit. S. G. Climenson, as Trustee of Elliott-O'Brien Company, a Corporation, Bankrupt, Appellant, vs. Carson, Pirie, Scott & Company, et al., Appellees. Stipulation for Dismissal of Appeal as to Bee Nuggett Publishing Company, and for Filing of Amended Assignments of Error, etc. Filed May 9, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3862. 6

**United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

In the Matter of
ELLIOTT-O'BRIEN COMPANY, a Corporation,
Bankrupt.

S. G. CLIMENSON, as Trustee of **ELLIOTT-
O'BRIEN COMPANY**, a Corporation,
Bankrupt,

Appellant,

vs.

CARSON, PIRIE, SCOTT & COMPANY, a
Corporation; **COFFMAN, DOBSON
BANK & TRUST COMPANY**, a Corpor-
ation; **BEE NUGGET PUBLISHING
COMPANY**, a Corporation,

Appellees.

BRIEF OF APPELLANT

NELSON R. ANDERSON,

Attorney for Appellant.

1723 L. C. Smith Building
Seattle, Washington

THE HOLLY PRESS, SEATTLE

FILED

AUG 17 1922

F. D. MONCKTON,
CLERK.

No. 3862.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

ELLIOTT-O'BRIEN COMPANY, a Corporation,
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S. G. CLIMENSON, as Trustee of ELLIOTT-
O'BRIEN COMPANY, a Corporation,
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Appellant,

vs.

CARSON, PIRIE, SCOTT & COMPANY, a
Corporation; COFFMAN, DOBSON
BANK & TRUST COMPANY, a Corpor-
ation; BEE NUGGET PUBLISHING
COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLANT

NELSON R. ANDERSON,

Attorney for Appellant.

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No. 3862.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of
ELLIOTT-O'BRIEN COMPANY, a Corporation,
Bankrupt.

S. G. CLIMENSON, as Trustee of ELLIOTT-
O'BRIEN COMPANY, a Corporation,
Bankrupt,

Appellant,

vs.

CARSON, PIRIE, SCOTT & COMPANY, a
Corporation; COFFMAN, DOBSON
BANK & TRUST COMPANY, a Corpor-
ation; BEE NUGGET PUBLISHING
COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

The trustee filed objections to the claims of
Carson, Pirie, Scott & Co. and Coffman, Dobson
Bank & Trust Co. on two grounds: that they had

received preferences prohibited (1) by the Bankruptcy Act and (2) by the law of the State of Washington prohibiting insolvent corporations from preferring creditors under the Trust Fund theory.

I.

Carson, Pirie, Scott & Co. filed its claim with the Referee in the sum of \$2,976.80 (R. 1, 2).

The written objections of the trustee set up that the bankrupt was a Washington corporation; that petitions alleging bankruptcy were filed May 10, 1921, and that adjudication followed May 17, 1921; that the bankrupt was insolvent during all of 1921; that on January 1, 1921, the bankrupt was indebted to Carson, Pirie, Scott & Co. for \$6,590.47; that bankrupt paid Carson, Pirie, Scott & Co. during 1921 \$4,254.11; that the bankrupt received from Carson, Pirie, Scott & Co. \$667.11 worth of merchandise; that the net depletion of the estate was \$3,657.73 during the four months' period; that said net payments paid said creditor 55 per cent of its account, while the remaining creditors (other than those whose claims were objected to) received nothing; that said creditor had reasonable cause to believe that said payments operated as a preference under the Bankruptcy Act.

In a separate paragraph the foregoing facts were realleged, except the allegation of "reasonable cause to believe" was omitted; and it was alleged that said payments operated as a preference under the laws of the State of Washington prohibiting insolvent corporations from preferring creditors under the Trust Fund theory.

The prayer was that Carson, Pirie, Scott & Co. take nothing on its claim until other creditors had received a like dividend of 55 per cent and then that all share equally in further dividends (R. 4-9).

The Reply denied all allegations of preference and set out the true amount of the claim was \$2,962.18 (R. 14).

II.

Coffman-Dobson Bank & Trust Co. filed its claim with the Referee in the sum of \$1,856.92 (R. 2-3-4).

The written objections of the trustee set up the same state of facts concerning bankruptcy, insolvency and preferences under both the Bankruptcy Act and the State law as in the objections to the claim of Carson, Pirie, Scott & Co., and

alleged that on January 1, 1921, said bankrupt was indebted to said bank in the sum of \$5,500.00 upon three notes maturing three months after date; that between April 5, 1921, and May 2, 1921, that is, within thirty-five days of bankruptcy, said bankrupt paid said bank ^{3,514.10} \$4,443.08, resulting in the payment of 67 per cent of its claim.

The trustee prayed that said creditor be charged with receipt of a dividend equal to 67 per cent of its claim, and that it take nothing until other creditors had received a dividend of 67 per cent of their claims and then that all share equally in further dividends (R. 9-14).

Orally the bank replied denying generally the allegations of the trustee.

III.

The trustee also objected to the claims of Fleischner-Mayer & Co. to the extent of 9 per cent of its claim, and Royal Worcester Corset Co. to the extent of 9 per cent of its claim; both stipulated they would be bound by the decision of the court on the contested claims; and to the claim of Bee Nugget Publishing Co. to the extent of 20 per cent. The other creditors have been paid nothing on their past due accounts (R. 94-98).

A hearing upon said claims and the objections to them was had before R. F. Laffoon, Referee in Bankruptcy, sitting at Tacoma, who found all the facts constituting a preference in favor of the trustee except that creditors had "reasonable cause to believe" that bankrupt was insolvent at the time payments were made.

The Referee was also of the opinion that the Washington decisions required proof of "reasonable cause to believe" to constitute a preference under the laws of the State of Washington.

An order was entered overruling the objections of the trustee and allowing said claims (R. 15). Thereupon the trustee petitioned the District Court for a review (R. 16). The District Court affirmed the referee's ruling (R. 27), but made no findings of fact and rendered a short opinion of four or five sentences (R. 28).

AMENDED ASSIGNMENTS OF ERROR.

I.

The Court erred in approving the ruling of the Referee allowing the claim of, and overruling the objections of the trustee to the claim of Carson, Pirie, Scott & Co. on the ground of preferences received contrary to the Bankruptcy Act prohibiting preferences to creditors.

II.

The Court erred in approving the ruling of the Referee allowing the claim of, and overruling the objections of the trustee to the claim of, Coffman-Dobson Bank & Trust Co. on the ground of preferences (....) received contrary to the Bankruptcy Act prohibiting preferences to creditors.

III.

The Court erred in approving the finding of fact, if it be a finding, made by the Referee as follows:

That the inventory showing was very good, \$26,371.39, and, while *that its* claimant, Carson, Pirie, Scott & Co., was very large, yet the inventory

would seem sufficient to pay it, and that, together with the manager's contention that he would reduce the stock, pay its debts, which he did actually proceed to do, might very easily lead claimant to believe that the manager was reducing all debts and not merely its debts; because same is not supported by, and is contrary to, the evidence.

IV.

The Court erred in approving the finding of the Referee, if it be a finding, as follows:

I do not believe that the claimant had knowledge of the insolvent condition of the bankrupt or sufficient reason to believe that it was receiving a preference; because same is not supported by, and is contrary to, the evidence.

V.

The Court erred in approving the finding of the Referee, if it be a finding, as follows:

Unless claimant had knowledge of the purposes of the dominant stockholder to close out the business it was not likely to suspect insolvency; because same is not supported by, and is contrary to, the evidence.

VI.

The Court erred in approving the finding of the Referee, if it be a finding, as follows:

The case at bar is distinguished from the cases relied on by the trustee in that the creditor was informed by the manager that he could pay his debts by reducing the stock; because same is not supported by, and is contrary to, the evidence.

VII.

The Court erred in approving the finding of the Referee, if it be a finding, as follows:

That Dan Coffman, cashier of Coffman-Dobson Bank & Trust Co., stated at page 145 of the transcript that the bank was liquidating as any other bank was, and if they had cleared up their notes the Bank would likely have accommodated them again; because same is not supported by, and is contrary to, the evidence.

VIII.

The Court erred in finding that said Carson, Pirie, Scott & Co. did not know or believe or have reasonable cause to believe that the transfers would effect a preference; because same is not supported by, and is contrary to, the evidence.

IX.

The Court erred in not finding that Carson, Pirie, Scott & Co. believed or had reasonable cause to believe that a preference was effected by payments made on account as shown by the evidence.

X.

The Court erred in not finding that Carson, Pirie, Scott & Co. believed or had reasonable cause to believe that a preference was effected by payments made on account of the failure of Carson, Pirie, Scott & Co. to introduce correspondence between it and the bankrupt, and the suppression of same, thereby establishing an inference of fact and a presumption of law that they knew, believed or had reasonable cause to believe a preference was effected.

XI.

The Court erred in finding that said Coffman-Dobson Bank & Trust Co. did not know or believe or have reasonable cause to believe that the transfers would effect a preference; because same is (135) not supported by, and is contrary to, the evidence.

XII.

The Court erred in not finding that Coffman-Dobson Bank & Trust Co. knew, believed or had

reasonable cause to believe that a preference was effected by payments made on account as shown by the evidence.

XIII.

That the Court erred in approving the ruling of the Referee and in allowing the claim of, and not sustaining the objections of the trustee to, claim of Carson, Pirie, Scott & Co., for preferences received contrary to the laws of the State of Washington prohibiting insolvent corporations from preferring creditors.

XIV.

The Court erred in approving the ruling of the Referee and allowing the claim of Carson, Pirie, Scott & Co., because the facts found do not, according to the laws of the State of Washington prohibiting insolvent corporations from preferring creditors, sustain the judgment.

XV.

That the Court erred in approving the ruling of the Referee and in allowing the claim of, and not sustaining the objections of the trustee to, claim of Coffman-Dobson Bank & Trust Co., for preferences received contrary to the laws of the State of Washington prohibiting insolvent corporations from preferring creditors.

XVI.

The Court erred in approving the ruling of the Referee and allowing the claim of Coffman-Dobson Bank & Trust Co., because the facts do not, according to the laws of the State of Washington prohibiting insolvent corporations from preferring creditors, sustain the judgment (136).

XVII.

The Court erred in not giving judgment in favor of the Trustee and against Carson, Pirie Scott & Co., upon the facts found containing all the elements of a preference under the laws of the State of Washington wherein insolvent corporations cannot prefer creditors no matter what the good faith of the creditor may be; knowledge, belief or reasonable cause to believe upon the part of a creditor that a preference was received is immaterial.

XVIII.

The Court erred in not giving judgment in favor of the trustee and against Coffman-Dobson Bank & Trust Co., upon the facts found containing all the elements of a preference under the laws of the State of Washington wherein insolvent corporations cannot prefer creditors no matter what the

good faith of the creditor may be; knowledge, belief or reasonable cause to believe upon the part of a creditor that a preference was received is immaterial. (R. 164-169.)

ARGUMENT.

The assignments of error present two questions. The first is a question of fact: Does the evidence show that appellees had "reasonable cause to believe" that bankrupt was insolvent at the time payments were made effecting a preference as required by the Bankruptcy Act? The second is a question of law: Are preferences void under the law of the State of Washington regardless of whether or not creditors have "reasonable cause to believe" that debtor is insolvent?

The elements of a preference are:

BANKRUPTCY ACT

1. Transfer of property.
2. To creditors.
3. Preceding creditors.
4. Voluntary action of debtor.
5. Application upon a debt.
6. Insolvency of debtor—debts greater than assets.
7. Within four months.
8. Greater percentage to creditor than other creditors.
9. Creditor knew or believed, or had reasonable cause to believe debtor insolvent.

STATE TRUST FUND

1. Same.
2. Same.
3. Same.
4. Same.
5. Same.
6. Insolvency of debtor—inability to pay bills as they mature in due course of business.
7. Within period of insolvency.
8. Same.
9. Good faith of creditor immaterial.

Rem. on Bankruptcy, Sec. 1393.

In passing it may be noted that "reasonable cause to believe" (9) has been defined to be notice or want of good faith (9).

Bassett vs. Evans, 253 Fed. 532 (8 C. C. A.).

The Referee found all of the elements necessary to constitute a preference under the Bankruptcy Act except that the creditors knew, believed, or had reasonable cause to believe that debtor was insolvent (R. 17-26).

As to insolvency, the Referee said:

"I have no doubt from this resume of figures that the bankrupt was insolvent in December, 1920, when the manager, as stated, started in to reduce the stock and pay the debts. The manager made every possible effort to reduce the stock and to pay the debts during January, February, March and up to April 25, when he abandoned the business and took service with the claimant herein, as he said, because he had no further interest in the business (R. 21).

The facts found in the record, interpreted in the light of the bankruptcy rule, show plainly, we think, that Carson, Pirie, Scott & Co. and the Bank not only had reasonable cause to believe that the debtor was insolvent, but that they actually knew it.

The test is well stated in the 1921 edition of *Collier on Bankruptcy* (12th edition), p. 912:

“A creditor has reasonable cause to believe a debtor to be insolvent when such a state of facts is brought to the creditor’s notice, respecting the affairs and pecuniary condition of the debtor, as would lead a prudent business man to the conclusion that he is unable to meet the payment of his obligations as they mature in the ordinary course of business. Where the creditor knew that the debtor’s business was bad and it was necessary to continually press the debtor for payment the creditor must be said to have had reasonable cause to believe that the debtor was insolvent and that the preference was intended.” Citing

Nat. Bank of Bakersfield vs. Moore, 247 Fed. 913 (9 C. C. A.).

Id., page 909:

“If insolvency is known to exist, or if the creditor had reasonable cause to believe that it existed, he will be presumed to have ‘reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference.’ ”

See 7 C. J. 153.

In *Healy vs. Wehrung*, 229 Fed. 686, 36 A. B. R. 673 (1916), this Court said:

“In so far as creditors are concerned, the purpose and policy of the Bankruptcy Act is the equal and equitable distribution of the bankrupt’s estate among them, subject only to the preferences or the priorities therein ex-

pressly allowed. From all the facts and circumstances shown by the record here, we regard it as clear that not only did the appellee, Wehrung, have reasonable cause to believe that by the payment to him he was thereby given a preference, but that the sale of the bankrupt's land which he initiated and caused to be consummated was all done for the very purpose of securing to himself, to his mother, and the bank of which he was president, such preferences. See *Toof vs. Martin*, 13 Wall 40, 20 L. Ed. 481; *Wager vs. Hall*, 16 Wall 584, 21 L. Ed. 504; *Coder vs. McPherson*, 152 Fed. 951, 82 C. C. A. 99; *In re McDonald & Sons* (D. C.), 178 Fed. 487; *Ogden vs. Reddish* (D. C.), 200 Fed. 977; *Heyman vs. Bank* (D. C.), 216 Fed. 685."

In *Toof vs. Martin*, *supra*, the United States Supreme Court said:

"And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led a prudent business man to the conclusion that they could not meet their obligations as they matured in the ordinary course of business."

Other decisions of this court are:

In re Dorr, 196 Fed. 292, 116 C. C. A. 112, 28 A. B. R. 505.

Stock Growers State Bank of Mountain Home vs. Corker, 220 Fed. 614.

National Bank of Bakersfield vs. Moore, 274 Fed. 913, 41 A. B. R. 409.

In the matter of *States Printing Co.*, 238 Fed. 775, 38 A. B. R. 526, the Circuit Court of Appeals for the Seventh Circuit, said the test was:

“Would the ordinary or the ordinarily intelligent man, with the same facts before him, have believed debtor was insolvent.”

In *Bassett vs. Evans*, 253 Fed. 532, 42 A. B. R. 587, the Circuit Court of Appeals for the Eighth Circuit, said:

“Courts must hold parties standing in the position which appellees occupied to have ‘reasonable cause to believe’ what a sensible business man, standing in their place and possessing their knowledge, would have believed.”

“Thus between actual knowledge and actual belief on the one side, and fear and suspicion on the other, lies the ‘reasonable cause to believe’ mentioned in the statutes. This classification, however, is not as helpful in the decision of a concrete case as it appears. Fear and suspicion of insolvency, if they be strong enough, become belief, etc.”

“What the statute requires is that the facts and circumstances known to the purchaser shall be ascertained and then the question answered whether those facts and circumstances would have caused an intelligent business man to believe that the preference was intended, or would have put the man upon an inquiry that would have discovered the true character of the transaction.”

The Circuit Court of Appeals for the Third Circuit, *in re Star Spring Bed Co.*, 265 Fed. 133, where

the bank's officers testified that they had neither knowledge nor belief that the Star Co. was insolvent, said:

“Such evidence, however, is neither controlling nor of much, if any, weight; for under Sec. 60-B of the Bankruptcy Act, the facts surrounding and attending the transfer were such as to cause a reasonably prudent man to believe that the bankrupt was insolvent; or were such as to put such a person on inquiry touching the solvency of the debtor, and such inquiry would have disclosed insolvency, the transfer is voidable.”

Concerning the withdrawal of 64 accommodation notes upon the explanation that the makers wanted them back, the Court said:

“More obvious indications of insolvency it would be difficult to conceive; but if these facts would not alone give the bank reasonable cause to believe that the Star Co. was insolvent, they were more than sufficient to put it on inquiry.

“Under these circumstances we believe that a reasonably diligent inquiry would have uncovered the existing insolvency of the Star Co. It was the bank's duty under the law to make such inquiry, yet it accepted the assignment and completed the transaction without investigation.

“Notwithstanding its inaction, it is chargeable with such knowledge as investigation would have disclosed. Lethargy under such circumstances is not rewarded by the law.”

In the matter of *Sutherland Co.*, 245 Fed. 663, 40 A. B. R. 305, the court said:

“It is true that Mr. Holcomb does not appear to have had any information as to the total indebtedness of the Sutherland Company, nor as to the value of its assets. Knowledge on these points can but seldom be brought home to persons accepting preferential payments; nor is it necessary. Reasonable cause to believe in such cases is usually inferred from circumstances very similar to those which exist here, *i. e.*, from inability to pay bills in the usual course of business as they mature, from poor business and from transactions of a character not ordinarily resorted to by solvent traders.”

“He was bound to draw such inferences as would naturally follow from the facts coming to his attention; and, where those facts would ordinarily excite suspicion as to solvency and cause inquiry, he is to be held to such knowledge as a reasonable inquiry would have furnished.

“Anything sufficient to excite attention and put a party on inquiry is notice of everything to which such inquiry would have led.”

In *Coder vs. McPherson*, 152 Fed. 951, 82 C. C. A. 99 (8), the Court said:

“Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose.”

Approved:

Wright vs. Skinner, 162 Fed. 315, 89 C. C. A. 23 (2).

Gandison vs. National Bank of Commerce, 231 Fed. 800 (2).

Bassett vs. Evans, 253 Fed. 532 (8).

Healy vs. Wehrung, 229 Fed. 686 (9).

In *Marks Ribbon Co. vs. Pilsbury*, 278 Fed. 161 (5), the Court said that a creditor had reasonable cause to believe if the creditor "believed that debtor already was or soon would be insolvent within the meaning of the Bankruptcy Act"; if creditor believed he "was likely to lose his debt in whole or in part by failure to obtain prompt payment of it."

In re Gaylord, 225 Fed. 234, the Court said:

"Financial embarrassment is not necessarily insolvency, but may under certain circumstances suggest it and put the creditor on an inquiry."

In re Champion, 256 Fed. 902, the court said:

"He may not have reasonable cause to believe at a given time, and still have knowledge of such facts as would put a reasonable man of intelligence on inquiry as to the financial condition; and if he does have such knowledge it is his duty to inquire, and such inquiry may disclose the facts which give the necessary reasonable cause to believe that the enforcement of a transfer would work a preference."

Scheurer vs. Katzoff, 233 Fed. 473, 37 A. B. R. 476.

JUDICIAL NOTICE.

The Court may take judicial notice of the financial depression existing throughout the country in 1920 and 1921.

In re B. & R. Glove Corporation, 279 Fed. 372 (2).

EVIDENCE.

In the light of the foregoing principles of law let us look at the evidence relating to "reasonable cause to believe" upon the part of Carson, Pirie, Scott & Co.

The payments of bankrupt to Carson, Pirie, Scott & Co., objected to by the Trustee as preferential, are as follows:

Jan. 25, 1921.....	\$ 265.50
27, 1921.....	495.55
Feb. 4, 1921.....	517.54
24, 1921.....	661.59
Mar. 5, 1921.....	715.80
Apr. 1, 1921.....	589.66
25, 1921.....	500.00
29, 1921.....	508.47
	<hr/>
	\$4,254.11

(R. 6, 21, 22, 153, 154.)

1917 to December 31, 1920.

1917, W. F. Elliott and Ed. O'Brien, who had been employees of Carson, Pirie, Scott & Co. for ten and thirty years, respectively, organized the Elliott-O'Brien Co., a Washington corporation (R. 46), with a capital stock of \$15,000.00. The company embarked in the retail dry goods business at Chehalis, Washington (R. 47). Ed. O'Brien died in 1918 (R. 47) and his brother, Charles O'Brien thereafter looked after the O'Brien interests. Charles O'Brien is also an employee of Carson, Pirie, Scott & Co. He has been with them for 30 years (R. 47) and is a pensioner of Carson, Pirie, Scott & Co. (R. 61), maintaining a desk in its place of business, and dictated the policy of the business in 1920 from Chicago (R. 47).

November, 1920, Charles O'Brien came to Seattle and met Mr. Elliott and Mr. LeSourd, who is trust officer for the Dexter Horton National Bank, the executor of the will of Ed. O'Brien, deceased. Mr. O'Brien was dissatisfied with the way things were going—the way the store was conducted—the present condition of the store, and spoke of closing it out (R. 34). They discussed the bankrupt's affairs and were of the opinion that the bankrupt was

carrying too large a stock and that its indebtedness was too large, and they agreed to reduce the stock in order to pay off the indebtedness, and further agreed to offer the business for sale (R. 34, 37, 38). Mr. O'Brien said Carson, Pirie, Scott & Co. wanted to be treated the same as other creditors—wanted to be paid (R. 61); not to buy any more goods from Carson, Pirie, Scott & Co. until its account was paid up (R. 62).

During 1917, 1918, 1919 and 1920 Carson, Pirie, Scott & Co. was the principal creditor of the bankrupt (R. 20, 54). It sold bankrupt over 75 per cent of all its dry goods, and over 50 per cent of all its purchases (R. 59). During 1920 it extended credit of \$16,000.00 to this \$15,000.00 bankrupt corporation (R. 55). On December 9, 1920, part of its account was 373 days old (R. 60).

With Carson, Pirie, Scott & Co. practically financing the bankrupt up to January 1, 1921, the bankrupt paid its other creditors promptly, even discounting its bills with other creditors (R. 71). Referring to Mr. Elliott's presence in Seattle in November, 1920, and the conference taking place at that time, Mr. Elliott said:

“Of course the Carson, Pirie, Scott indebtedness was the largest part of it, and was long past due. Nothing else was past due. We did not owe a dollar (of past-due indebtedness except to Carson, Pirie, Scott & Co.). Our statement will show that in November, December and January there was nothing else past due; everything was up in shape. Everything was paid in January, and everything was paid in February and we did not owe anybody. Nobody was wanting their money. *Carson, Pirie, Scott did not have to have that money; and we did not have to pay them.* We took advantage of all our discounts that came along, except the Carson-Pirie-Scott Co.” (R. 71).

“Q. (Mr. McClure) And how did that happen to be in that condition?

A. We always had a standing account with them.

Q. They always had a substantial claim against the Elliott-O'Brien Co.?

A. Oh, yes; they always had a big claim,—a substantial account with them ever since we began business—which had been past due.

Q. There was nothing unusual about the past due claim then?

A. Not after the first six months we were in business.

Q. In your other debts, except the bank, business, you kept up?

A. Absolutely. Of course I might make an exception, in those last months, January, February and March, we could not take care of our indebtedness, as our books will show, and then we owed two other accounts besides Carson,

Pirie, Scott, that is, Fleischner Mayer and Western Dry Goods Company, but nobody else. That was in March" (R. 71, 72).

Concerning business conditions Mr. Le Sourd said:

"Prices had been dropping in merchandise during the fall of 1920 quite rapidly, and more rapidly in the spring. I could not say how much more rapidly in the spring than in the fall, because I am not familiar enough with the dry goods business to answer that (R. 43, 44).

"Of course, we all recognized the fact that a business like that, carrying merchandise stock of from \$25,000 to \$30,000 and an indebtedness running up to \$15,000 or \$20,000, is always in danger. It is not good business, and we wanted to reduce the stock and reduce the indebtedness at the same time, and operate the same in a better financial position; and then it would not take so much cash to buy it" (R. 45).

1921.

January 1, 1921, the indebtedness of the bankrupt to Carson, Pirie, Scott & Co. was \$6,590.47 (R. 55, 56; Trustee's Ex. C at R. 153, 154).

As to business conditions in 1921, Mr. Elliott said:

"The bottom simply fell out of business in January, not only in Chehalis, but everywhere. Values went down and there was not any business, absolutely no business. We put in as much advertising in January as we did in De-

ember, and the sales will show,—our sales in January show \$6,000 approximately, and in December they were a little over \$16,000. We had put forth the same effort in January as we had in December. There was absolutely no business.

Q. That slump continued how long?

A. That slump continued, and when I left the business was then very quiet. Of course the merchandise was really receding every month” (R. 75).

“During January, February and March, 1921, bankrupt was unable to take care of its bills, as the books will show, testified Mr. Elliott. “Yes, some of these bills were really a year past due, at least, eight months past due, making a year’s time” (R. 60).

The bankrupt’s ledger shows:

	Merchandise Past Due	Merchandise Not Due	Bank	Total
January	\$3,970.68	\$7,108.15	\$5,500.00	\$16,578.83
February	3,436.14	9,291.39	5,500.00	18,227.53
March	4,788.79	9,527.45	5,500.00	19,816.24
April	8,693.19	3,823.42	5,500.00	18,116.61

(Trustee’s Ex. B at R. 152).

January, 1921, the bankrupt decided to sell out and quit business (R. 49-50).

February, 1921, Carson, Pirie, Scott & Co. refused credit to the bankrupt, and from January 1, 1921, to date of bankruptcy, May, 1921, Carson, Pirie, Scott & Co. sold bankrupt only \$566.50 worth of merchandise (R. 153, 154); in 1921, the bankrupt

purchased from the other creditors, who are represented by the trustee, \$10,582.50 worth of merchandise (R. 19, 54, 152).

February, 1921,

“They refused to ship us any more merchandise until we paid our past due bills. We wanted to buy our spring merchandise and they refused to ship it to us unless we would pay more on our past due bills” (R. 60).

On February 17, 1921, Coram T. Davis, attorney for Carson, Pirie, Scott & Co., with offices in the dry goods house of Carson, Pirie, Scott & Co. (R. 51), who represented that company in its financial dealings with bankrupt (R. 51, 143), wrote a letter to Mr. Le Sourd of the Dexter Horton National Bank, as follows:

“It would be best for all concerned to have this business closed out as speedily as possible” (R. 116).

On February 18, 1921, Le Sourd wrote C. H. O'Brien, care of Coram T. Davis, Carson, Pirie, Scott & Co.:

“Mr. Elliott seemed to think that on account of present conditions *no advantageous sale could be made*, and Mr. Hart joined with him in this position. They both claimed a greater return could be accomplished by *putting on a closing out sale*, which we understand they are now doing. Mr. Hart has returned to Che-

halis with Mr. Elliott, telling me that the only cost Elliott-O'Brien would be put to—would be the actual expenses. I have talked with Mr. Adams of the local Carson, Pirie and Scott Co. office, and have him on the lookout for a prospective purchaser” (R. 117).

On March 12, 1921, Le Sourd telegraphed Davis:

“Fear receivership if business drifts along. What do you think of the proposition” (R. 119, 120).

On March 16, Le Sourd wrote Davis concerning:

“the plan to close the store out by disposing of the stock gradually to customers until it has been reduced to ten thousand or fifteen thousand, when it will be easier to find a purchaser. This probably is going to be difficult to accomplish, however, *as someone might step in and demand that a receiver be appointed*. The stock is evidently worth something in excess of the debts, but it is going to be another question to realize on the stock as rapidly as the obligations mature” (R. 123, 124).

On April 14 Le Sourd wrote Davis:

“A special sale has been put on this month, employing a specialist from Portland who guaranteed to unload \$20,000.00 worth of stock in thirty days. It appears that the sale has been a failure, largely for the reason that people are unable to buy because of quiet times in the Northwest, and in Chehalis in particular. The store has been advertised for sale,—but no one

appears to be especially interested in the matter, as Chehalis seems to have a very black eye in so far as the dry goods business is concerned. Mr. Hart thinks it will be impossible to avoid a receivership unless someone is found within the near future to buy the store as a going proposition" (R. 141).

On April 23 Le Sourd again wrote:

"That the indebtedness would run in the neighborhood of nineteen thousand dollars and that if it seems impossible for the store to pay its debts we would suggest that the stock be turned over to the creditors at once" (R. 148-150).

In March, 1921, Elliott wrote Carson, Pirie, Scott & Co. asking for a position as salesman on the road (R. 49-73-79). Elliott was employed by them the first part of April, 1921 (R. 49); thus, the last of March Carson, Pirie, Scott & Co. knew that Mr. Elliott, manager and only officer in the United States of the bankrupt, was planning to abandon the concern.

Carson, Pirie, Scott & Co. also knew debtor was seeking a purchaser for the store (R. 51).

April 26, 1921, Elliott abandoned the business and became a salesman for Carson, Pirie, Scott & Co. (R. 48, 49). He left it in charge of Mr. Hart,

formerly employed by Carson, Pirie, Scott & Co. (R. 141).

The bankrupt was conducting special sales continuously during November, December, January, February, March and April; it had signs across the face of its store in April advertising a "closing out" sale. The bankrupt advertised extensively — "Came out with special advertising and filled the town. We got seven thousand circulars out and we mailed some of them and covered the whole territory there" (R. 62, 63). The bankrupt advertised in January or February in the Portland Oregonian and the Seattle Times for a purchaser for its business (R. 49).

April 1 the bankrupt called in a special sales agent from Portland to put on a special sale. Prices were slashed in order to raise money (R. 87).

The testimony in this case was given by Mr. Le Sourd, who was the Seattle representative of Mr. O'Brien, who has been pensioned by Carson, Pirie, Scott & Co., by Mr. Elliott, who is now employed by Carson, Pirie, Scott & Co., and who was brought to court by the attorneys for Carson, Pirie, Scott & Co., and by Mr. Hart, who was formerly employed by Carson, Pirie, Scott & Co. Claimants under cross

examination of their own witnesses developed facts that they considered helpful to themselves.

The Trustee was never able to locate the correspondence file of the bankrupt, nor its cancelled checks or check stubs. It appeared at the hearing before the Referee that Mr. Elliott had carried off part of the correspondence between bankrupt and Carson, Pirie, Scott. He was ordered by the Referee to forward to the Referee within thirty days all letters in his possession, but has failed to do so (R. 51).

Carson, Pirie, Scott & Co. did not offer any of the correspondence exchanged between it and the bankrupt. It kept its own correspondence tight in its own files and failed to offer the best evidence that could exist of its knowledge or lack of knowledge of the insolvency of the bankrupt. In such cases there is a well-established inference of law that such evidence, if produced, would have been fatal to its case.

“The failure of a party to call an available witness possessing peculiar knowledge concerning facts essential to the party’s case, direct or rebuttal, or to examine such witness as to the facts covered by his special knowledge, especially if the witness would naturally be favorable to the party’s contention, relying instead upon the evidence of witnesses less familiar with

the matter, gives rise to the inference that the testimony of such uninterrogated witness would not sustain the contention of the party."

(22 C. J. 115, 116.)

"The brother was not called as a witness. He alone knew the actual facts of the transaction. It was clearly in defendant's power to have produced him and the defense of good faith required him to do so. Failure to call this witness justifies the inference that, if he had been called, his testimony would have been fatal to defendant's case."

Hill vs. U. S. (C. C. A. 8), 234 Fed. 39.

See also:

Herald vs. Tooney, 92 Wash. 297.

Kirby vs. Talmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463.

It seems to the Trustee that this case is remarkably free from doubt and very clear that "reasonable cause to believe" was abundantly established.

Taking into consideration the intimate relations existing between Mr. Elliott and the two O'Briens with Carson, Pirie, Scott & Co.; the fact that debtor was known as a "Carson, Pirie, Scott & Co. store" by virtue of an extension of credit for \$16,000.00 in 1920 (R. 55), and its purchase of 75 per cent of its dry goods from Carson, Pirie, Scott & Co. up to

February, 1921 (R. 59); the refusal in February to sell any more goods on credit; the slump in business throughout the U. S.; the fact that bills of Carson, Pirie, Scott & Co. were *more than one year old*; that Carson, Pirie, Scott & Co. on March 12 knew past due and not due amount of bills of bankrupt (R. 119, 120); the disagreements between Elliott and O'Brien; the correspondence going to Coram T. Davis, attorney for Carson, Pirie, Scott & Co., whose offices are in the dry goods house of Carson, Pirie, Scott & Co., with its *warnings that a receivership was imminent*; the notice in March to Carson, Pirie, Scott & Co. from Elliott that he *intended to abandon the business* while Mr. O'Brien, a pensioner of Carson, Pirie, Scott & Co. was down in the Bermudas; its knowledge that bankrupt was seeking a purchaser for the store; its employment of Mr. Elliott the first of April as one of its salesmen,—we think the ordinary business man or the ordinarily intelligent man, with these facts and circumstances before him, would have believed the bankrupt was insolvent, and consequently that the payments were preferential.

It seems to us a misuse of the English language to say these facts would not put a man of ordinary prudence on inquiry.

The course of dealing between this creditor and this debtor is significant indeed. In 1917, 1918, 1919 and 1920 Carson, Pirie, Scott & Co. was the principal creditor of bankrupt. It extended credit to such a large extent as to practically finance bankrupt; it extended a \$15,000.00 corporation credit of \$16,000.00 in 1920; the amount was long past due, part of it over one year old. The indebtedness was reduced January 1, 1921, to \$6,590.47.

As long as Carson, Pirie, Scott & Co. extended credit running into the thousands, and as high as \$16,000.00, and carried them along, allowing the account to take a year's time for payment, the bankrupt paid its other bills and took discounts from creditors generally, as the record shows. But when in the fall of 1920 Carson, Pirie Scott & Co. began to collect in its account and reduced its account due from bankrupt to \$6,590.47 by Jan. 1, 1921, and shut off credit altogether in February, the bankrupt "could not pay its bills, as the books will show."

The creditors represented by the trustee delivered merchandise to the bankrupt in 1921 amounting to \$10,582.50 (R. 19, 54, 152). Carson, Pirie, Scott delivered \$566.50.

Carson, Pirie, Scott received payments of \$4,254.11 covering its current account of \$566.50 in full and a balance of \$3,657.73 to apply on its old account, resulting in paying 55 per cent of said account.

The record shows the amount of indebtedness remained about the same. It was switched from appellees to the other creditors. The indebtedness of the bankrupt on Jan. 1, 1921, was \$18,751 (R. 162). At the time of bankruptcy it was \$16,740.29 (R. 21).

The Jan. 1 indebtedness of \$18,751 was made up as follows:

Carson, Pirie, Scott & Co.....	\$6,590.47
Bank	5,500.00
	<hr/>
	\$12,090.47
Other creditors	6,661.00
	<hr/>
	\$18,751.00

By May, or date of bankruptcy, the indebtedness of \$16,740.29 was made up as follows:

Carson, Pirie, Scott & Co.....	\$2,962.78
Bank	1,856.92
	<hr/>
	\$ 4,819.70
Other creditors	11,920.59
	<hr/>
	\$16,740.29

Its refusal of credit to a store that it had practically financed and which was one of its best cus-

tomers, is a plain and forcible statement of what creditor thought of debtor's financial condition. It conclusively shows that creditor had formed adverse judgment and considered debtor's condition bad, that it had lost faith in the enterprise and wanted to get out and close up what had been one of its best accounts. From its own account it knew debtor was in straightened circumstances, that it could not take care of its bills, and it knew, as every merchant in the United States in 1920 and 1921 knew, with the dry goods market sloughing off approximately 50 per cent, that hard times were ahead for a concern that could not pay its bills. They reversed their policy and started in to reduce their account as rapidly as possible and at the same time to furnish no more goods.

What plainer statement could be made to the creditor that debtor was broke than to notify him that a receivership was imminent (March 12, 1921); that someone might step in and demand that a receiver be appointed (March 16, 1921); that it will be impossible to avoid a receivership unless a buyer is found in the near future (April 23, 1921)?

What inference would the average business man draw from the receipt of a letter in March, 1921, from the manager and only officer of debtor corpora-

tion in the United States, saying he is going to quit and asking for a job? Giving him a job the first part of April? Pulling out and abandoning the business on April 26th?

Knowledge that debtor was running special sales continuously and advertising for a purchaser would naturally raise an inquiry in the creditor's mind as to the debtor's solvency or insolvency.

The record shows that Le Sourd had "reasonable cause to believe"; for he told the bank on April 22 that it could not take from debtor a thousand dollars a week and debtor still continue to do business (R. 35, 36). The record shows that Hart in his letters and in his oral testimony, also had "reasonable cause to believe"; for he said that he realized the first week in April that they could not continue in business if the bank insisted on payments of \$1,000 a week (R. 129, 130).

We think some of the foregoing circumstances standing alone would constitute reasonable cause to believe; that all the facts and circumstances taken together are more than sufficient; that this case is stronger on its facts than the cases heretofore decided by this court and cited hereinbefore.

The trustee believes that the facts are more than sufficient to show that Carson, Pirie, Scott & Co. and the bank had reasonable cause to believe, at the time they received payments on their accounts, that the bankrupt was insolvent; that the ordinarily intelligent business man would, under the circumstances shown to exist, have had good reason to be apprehensive about his account. In fact, every wholesaler and banker in the country were extremely vigilant during 1920 and 1921, as to their accounts receivable, owing to the financial depression existing throughout the country. The years 1920 and 1921 were critical years for business men, and their credit departments were more sensitive and vigilant as to the collectibility of their accounts than in prosperous times or in normal times.

It is truly an amazing thing to read the opinion of the District Court that during a period of drastic deflation, etc., that notice of insolvency should be shown with much greater clearness than can be contended was done in the present case. From actual experience every business house in the country well remembers that during the period of inflation when the market was rapidly rising and the markup on merchandise was very great, and business was consequently prospering, that credit was liberally ex-

tended and that the credit department rested on its oars. But when the tide turned and prices went down and all merchants were subjected to heavy losses, and inventories based on cost price were known to be fictitious, when credits tightened and insolvencies commenced to manifest themselves in bankruptcy, insolvency proceedings in the state court, voluntary assignments and settlements outside of court, and the affairs of every debtor were subject to close scrutiny and question, it required very little evidence of danger to make a credit man apprehensive and to raise an inquiry in his mind as to the solvency of his debtors' accounts.

“ ‘One swallow does not make a summer,’ but when we see the sky full of swallows homeward flying, and are not aware of the season of the year, we well may inquire, ‘Is not summer here?’ ”

In re Campion, 256 Fed. 902.

COFFMAN-DOBSON BANK & TRUST CO.

On January 1, 1921, the bank accepted three renewal notes from debtor in the sum of \$5,500.00, maturing three months after date (R. 112). These notes were collected as follows:

April	5.....	\$ 500.00
	9.....	500.00
	9 Interest.....	1.55
	14.....	500.00
	19.....	500.00
	23.....	500.00
	27.....	500.00
	30 Interest.....	12.55
May	2.....	500.00
		<hr/>
		\$3,514.10
		143.08
May	4 balance on deposit appro-	
	priated	143.08
		<hr/>
		\$3,657.18

The balance as per claim filed is \$1,856.92.

The bank is located just across the street from the bankrupt's store; the bankrupt was conducting special sales during November, December, January, February and March; during April it had signs across the face of its store advertising a "closing out" sale; the bankrupt advertised extensively; "came out with special advertising and filled the town. We got seven thousand circulars out and mailed some of them and covered the whole territory there" (R. 62, 63).

In January or February the bankrupt advertised in the Portland Oregonian and the Seattle Times for a purchaser for its business (R. 49); the bankrupt

was negotiating with prospective purchasers for its store during January, February and March (8. 49); the bank knew that the bankrupt had purchasers in view (R. 109).

On April 1, 1921, the bankrupt, by its own books, was overdrawn at the bank in the sum of \$309.99 (R. 53), but an overdraft did not appear on the bank's books until April 9, when an overdraft appeared of \$16.20.

The bankrupt's balances with the bank, as shown by the bankrupt's books, were as follows:

Jan. 1, '21.....	\$177.57
Feb. 1, '21.....	284.10
Mar. 1, '21.....	89.28
Apr. 1, '21 o. d.....	309.99

The deposits with the bank during April, 1921, were small:

April 1	\$ 408.85	April 16	\$ 240.01
" 2	403.23	" 18	327.19
" 3	816.65	" 19	827.95
" 5	344.77	" 20	215.81
" 6	291.65	" 21	173.04
" 7	347.06	" 23	622.80
" 8	146.00	" 25	1,199.51
" 9	265.63	" 26	414.44
" 11	393.28	" 27	353.03
" 12	126.63	" 28	385.30
" 13	202.72	" 29	255.68
" 14	403.79	" 30	234.36
" 15	379.75	May 3	239.32

(R. 111, 112).

The bank's ledger-sheet shows the small balances of the bankrupt with the bank as follows:

April 1	\$ 357.69	April 19	\$ 736.00
" 1	683.66	" 20	742.83
" 2	1,221.19	" 21	864.78
" 5	10.51	" 22	861.28
" 6	242.16	" 23	369.71
" 8	223.42	" 25	1,281.72
" 9 Overdraft.....	16.20	" 26	1,461.66
" 11	180.58	" 27	616.07
" 12	282.21	" 28	964.62
" 13	129.24	" 29	720.30
" 14	33.03	" 30	928.78
" 15	412.78	May 2	427.65
" 16	452.79	" 3	158.50
" 18	751.15	" 4	143.08

(R. 110, 111).

The record shows that the first payment made the bank was on April 5, in the sum of \$500.00 (R. 11). The bank's ledger-sheet shows that after the bank received its \$500.00 on April 5, that the balance in the bank was \$10.51 (R. 111).

The second payment to the bank was \$500.00 on April 9, and caused an overdraft of \$16.20. The third payment on April 14, of \$500.00, left a balance in the bank of \$33.03. Payments of \$500.00 on the 19th, 23rd, 27th of April and on May 2 left balances of respectively \$736.00, \$369.71, \$616.07 and \$427.65, and a final balance on May 4 of \$143.08, which the bank applied on its account.

An inspection of the deposits with the bank and the balances on hand on the days of payment, and the balances on the days in between, show that the bankrupt and the bank built up the balances so that they could take out payments of \$500.00 every four or five days.

The notes fell due on April 1 and on April 1 the bank demanded payment of said notes, amounting to \$5,500.00; the bank made a determined stand for payment of its account at that time (R. 85). The bank said that other creditors were paid and they were not (R. 85).

Describing the attitude of the bank, Mr. Hart, assistant manager of the bankrupt, wrote Le Sourd on April 8:

“The sale is not coming up to expectations, the average sales not going over \$275.00 daily so far. As the bank has taken a *determined stand for immediate payment of their loan*, or at least \$1,000.00 a week, I am fearful that some creditors might step in and close it up. There are several accounts long past due and I cannot see how they can be satisfied to the extent of allowing us to continue much longer on the basis we are now conducting business” (Trustee’s Ex. A, R. 129, 130) (our italics).

Concerning this letter Mr. Hart testified:

“That was based on the amount of business we were doing, and if we had to pay the

bank, we were satisfied we could not do it and some of the rest of the creditors would step in" (R. 86).

The officers of the bankrupt were satisfied that the business could not continue any longer on the basis on which it had run without someone stepping in and suing them and closing them up (R. 86). This conclusion was reached April 8, 1921 (R. 86).

Mr. Hart said from the deposits the bank knew the sale was not going well (R. 87); that he told him (bank) that in order to do business at all we had to slash prices to such an extent it would mean there would be no surplus over and above the liquidation of the wholesale bills and what was due the bank" (R. 87).

The bank knew by April 12, that Elliott was going East and had withdrawn from the business (R. 78-79).

On April 22, Mr. Le Sourd told Mr. Donohue, vice president of the bank, that he had been informed that the bank had made a demand on the company for the payment of one thousand dollars a week and that Mr. Hart was going to be in charge of the store; that the store was not taking in a great deal of money and that the bank should not expect

them to pay everything that was taken in at the store on the bank's claim; that the store could not be kept running in that way (R. 35, 36).

The bank knew that the deposits for April amounted to \$9,779.13 (R. 111, 112); that Carson, Pirie, Scott & Co. took \$1,598.23; that the bank took \$3,513.10; that the expenses amounted to \$2,806.29 (R. 152), and that other creditors received about \$800.00.

These two creditors took during April \$5,111.33 out of \$5,900.00 disbursed to creditors.

The Referee's certificate to the effect that the banker said he would likely have loaned them money after they had taken up the indebtedness of \$5,500.00, must be considered in the light of the testimony of the banker, which is as follows:

“Q. If they paid you off in full at the rate of \$1,000 a week they would not have any credit with the bank to do business in paying for their merchandise bills, would they?”

A. Well, that would have been left to us to judge after they were paid.”

A banker, better than any other creditor, knows the financial condition of its debtor. All its money passes through his hands. He knows the amount of sales day by day; he knows the amount of money on

hand. In this case he knew the sales were small; he knew that what money was raised, was raised by slashing prices through a special sales agent and under heavy pressure. From the amount of deposits he knew the sale was not a success. He knew the balances on hand were very small. He knew he was being paid and that other creditors were not. *He must have known, just as the officers of the bankrupt testified, that they could not pay the bank \$1,000 a week and continue to do business...* In fact, on April 22, Mr. Le Sourd told the vice president of the bank that the store could not pay the bank \$1,000 a week and still do business. After that plain statement of one banker to another the bank collected in \$1,512.55. *What other people knew and believed the bank must also have known and believed.*

Courts are not impressed by pleas of ignorance by banks as to the financial condition of their customers, especially when located in small towns.

In re McDonald & Sons, 178 Fed. 487, cited in *Healy vs. Wehrung*, 229 Fed. 696 (9).

Matter of Brayton, 47 A. B. R. 388.

Thompson vs. Huron Lumber Co., 4 Wash. 600, 604.

The fact that the bank knew that the bankrupt was trying to sell out would naturally have put it on inquiry. The fact that Mr. Elliott, manager of the bankrupt, was quitting the business, abandoning it and leaving for the East to take a position as salesman, would notify any man that the concern was broke and that the day of reckoning was at hand. The bank knew, as everyone would know, that if it took \$1,000 a week out of the account of the bankrupt, other creditors could not be paid and that it was getting a preference.

Any inquiry that the bank would have made the first of April would have shown it by an inspection of the bankrupt's ledger that its merchandise bills were long past due and that it was not paying its merchandise creditors as their accounts came due. The fact that the bank complained that other creditors were being paid and they were not, and that they made a determined stand for payment, shows the mental attitude of the bankers toward a customer they had been carrying for four years.

Applying the test of the Bankruptcy Act to this creditor it seems hardly a debatable issue that the bank had reasonable cause to believe that the concern was insolvent and consequently that it was receiving a preference.

PREFERENCES UNDER STATE LAW.

I.

At the oral argument the District Court raised the question of the right of a Trustee in Bankruptcy to recover a preference under the state law prohibiting insolvent corporations from giving a preference. The right of a Trustee cannot be doubted. Section 8 of Act of June 25, 1910, amending Section 47, cl. 2, of Act of 1898 (36 Stat. 840), provides that a Trustee

“shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.” Section 70 E, Bankruptcy Act, provides:

“The Trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication.”

In *Stellwagen vs. Clum*, 245 U. S. 605, 41 A. B. R. 1, a question arose as to the right of a Trustee in Bankruptcy to rely upon the statutes of Ohio prohibiting preferential transfers. The court held the right of the Trustee was expressly given by Sec.

70 E. After quoting said section Mr. Justice Day said:

“This section as construed by this court gives the Trustee in Bankruptcy a right of action to recover property transferred in violation of state law.

“And a right of action in this subdivision is not subject to the four months’ limitation or other sections (60 B, 67 E) of the Bankruptcy Act. In this subdivision, if a creditor could have avoided a transfer under state law, a Trustee may do the same.”

In *Grandison vs. Robertson*, 231 Fed. 785 (2d C. C. A.) the Trustee in Bankruptcy alleged that an insolvent corporation had given a preference contrary to the bankruptcy act and contrary to the statutes of New York prohibiting insolvent corporations from giving preferences. The court held there was no preference under the Bankruptcy Act, but that there was a preference under the state statutes and that the Trustee in Bankruptcy could assert the rights of creditors under the state statute by virtue of Sec. 67 E of the Bankruptcy Act and that knowledge or reasonable cause to believe on the part of a creditor was non-essential.

Judge Rogers said:

“It is to be observed that under the Bankruptcy Act a preferential payment to be avoided must have been received by one who had

‘reasonable cause to believe’ that it would effect a preference; while under the New York Stock Corporation law the invalidity of the payment is not made to depend upon the knowledge of the one receiving payment that it is a preferential payment or upon his having reasonable cause to believe that it is a preferential payment.”

In *Cardoso vs. Brooklyn Trust Co.*, 228 Fed. 333, the same Court held that a Trustee in Bankruptcy might avoid a preference under the state law by virtue of Sec. 70 E of the Bankruptcy Act.

In *McGill vs. Commercial Credit Co.*, 243 Fed. 637, the District Court of Maryland said:

“Within the meaning of the New York statute, insolvency is a general inability to pay in the course of business the liabilities existing and capable of being enforced. *Brouwer vs. Harbeck*, 9 N. Y. 389. For its application it is not necessary that knowledge or notice of insolvency shall have been brought home to the creditors receiving the preference.

“The Circuit Court of Appeals for the Second Circuit has held that the Trustee in Bankruptcy may recover property the transfer of which this state statute declared void. *Grandison vs. Robertson*, 231 Fed. 785, 145 C. C. A. 605. In that case the Trustee’s authority was derived from Sec. 67 E of the Bankruptcy Act (Comp. St. 1916, Sec. 9651); but in *Cardoso vs. Brooklyn Trust Co.*, 228 Fed. 333, 142 C. C. A. 625, the conveyance to set aside was made nine months before bankruptcy and the Trustee relied upon the provision of Sec. 70 E. Under the

construction placed upon this state statute by the highest court of New York, its application is not limited to cases in which the corporation has refused to pay its notes or other obligations when due. It is declared that the enactment was intended to prevent unjust discrimination and preferences among creditors of insolvent corporations or those bordering upon insolvency. *Cole vs. Millerton Iron Co.*, 133 N. Y. 164, 30 N. E. 847, 28 A. S. R. 615; *Casser vs. Barnard*, 156 App. Div. 724, 141 N. Y. S. 659; *Id.* 209 N. Y. 570, 103 N. E. 1122."

Referring to Sec. 70 E, 7 C. J. 182, says:

"The effect of this provision is to give to the Trustee the same rights with respect to such transfers as are conferred on the bankrupt's creditors, or any of them, by the common law or the statutory law of the state where the property is located."

Collier on Bankruptcy (1921 ed.), page 1178, referring to Sec. 70 E, says:

"It is the corollary of Sec. 67 B, and means simply that if a creditor could have avoided any transfer (not merely a lien) under the laws of the state, the Trustee can do the same,"

and cites *Williams vs. Davidson*, 104 Wash. 315, 176 Pac. 334.

The Supreme Court of the State of Washington has held that a Trustee in Bankruptcy may set aside a preference as defined by the Bankruptcy Act, or as defined by state law.

Benner vs. Scandinavian American Bank, 73 Wash. 488, 131 Pac. 1149.

Williams vs. Davidson, 104 Wash. 315, 176 Pac. 334.

The decision of the United States Supreme Court above quoted that the Trustee may proceed under Sec. 70 E and assert any right that a creditor might assert is conclusive authority for the right of the Trustee here to proceed under both the Bankruptcy Act and the state law. In that case, in the cases in the Second Circuit, and in the Washington cases the Trustee asserted his rights under both the Bankruptcy Act and under the state law.

These decisions are also a full answer to the contention that the Trustee must prove insolvency within the meaning of the Bankruptcy Act under Sec. 67 E; for under Sec. 70 E the Trustee asserts the rights of creditors as they possess them under the state law. Under state law the trustee need prove insolvency as defined by state law, namely, inability to pay bills as they mature in due course.

II.

Stellwagen vs. Clum, 245 U. S. 605.

At the oral argument the district court also inquired if the payment of money was a transfer

constituting a preference.

7 C. J. 157 says:

“A payment of money to a creditor may constitute a preferential transfer within the meaning of the Bankruptcy Act.”

In *Pirie vs. Chicago Title Electric Co.*, 182 U. S. 438, 21 S. Ct. 906, 45 L. Ed. 1171, the Court said:

“It would be anomalous in the extreme that any statute which is concerned with the application of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give a preference, should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories.”

Held, payment of money was a transfer of property making a preference.

See *Remington on Bankruptcy*, Sec. 1283-1289.

Union Trust Co. vs. Amery, 72 Wash. 648, 131 Pac. 199.

III.

Some slight contention was made by appellees that other creditors than those named in our opening statement received preferences at the hands of bankrupt. They point out that payments were made to said creditors by the bankrupt during 1921. The

status of this matter is fully set out in the Record at page 157. It can best be explained by example.

Western Dry Goods Co. filed its claim with the Referee for \$991.85. It appears that on January 1, 1921, the bankrupt owed said claimant \$904.66, that claimant sold bankrupt, within four months of bankruptcy, \$1,016.71 worth of goods, and received from bankrupt payments of \$929.52 within said four months. Comparing said sales of merchandise and said payments it is at once apparent that said claimant delivered to bankrupt and added to its assets \$1,016.71 worth of merchandise and took from bankrupt \$929.52 in money, that the net result is to increase the assets of bankrupt within the four months' period by some \$86.00, rather than to deplete the estate of the bankrupt. Under such circumstances there could not be any preference to Western Dry Goods Co.

Remington on Bankruptcy, Sec. 1419:

“After the insolvency, the aggregate result to the trust fund, as to whether it has been enriched by the transaction taken as a whole, notwithstanding the alleged preference, is to govern.

“And the different items of payment, new goods, credits, etc., are not to be taken separately, nor are merely these new credits com-

ing after any particular payment by the debtor to be offset against the payments preceding the particular credits. But the transactions after the insolvency within the four months are to be taken as a whole and the net result taken."

Mr. Remington, in Sec. 1420, says:

"Where the entire transaction—all the items of the running account—occur within the four months' period and after insolvency, payments on account are not preferential and need not be surrendered."

See also:

Jacquith vs. Alden, 189 U. S. 78.

Peterson vs. Nash, 112 Fed. 311 (CCA Minn.)

Re Geo. M. Hill Co., 130 Fed. 315 (CCA Ill.)

Yaple vs. Dahl-Millakan Grocery Co., 193 U. S. 526.

In re Grocer's Baking Co., 266 Fed. 900, 7 C. J. 168.

IV.

STATE TRUST FUND THEORY.

The Supreme Court of the State of Washington has held in a great many cases that an insolvent corporation cannot prefer its creditors, *no matter what the good faith of the creditor may be.*

The first announcement of this rule arose where a mortgage was given by an insolvent corporation to a bank and there was no finding that the bank knew that the corporation was insolvent.

The court said:

“This will not do in the case of an insolvent corporation, no matter what the good faith of the creditor is. When it has reached a point where its debts are equal to, or greater than its property, and it cannot pay in the ordinary course, and its business is no longer profitable, it ought to be wound up and its assets distributed.

“The purpose in thus placing insolvent corporations in the possession of the courts can only be that their assets may be distributed ratably to creditors. A general assignment without preferences does not defeat this purpose, but, if the estate of a corporation comes into court, or into the hands of the assignee, burdened with preferences, there is an end of equal distribution, and the object of the law is defeated.”

Thompson vs. Huron Lbr. Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

In *Conover vs. Hull*, 10 Wash. 673, 39 Pac. 166, 45 A. S. R. 810, is found an exhaustive and able opinion by Judge Dunbar defending the trust fund theory, and laying down the principle that a voluntary preference by an insolvent corporation was void under the holding of *Thompson vs. Huron Lbr. Co.*, *supra*.

Judge Dunbar quotes Sec. 803 of Morawetz, from which we extract:

“If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved by implication to the company and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property in order to carry on its business, and further the purposes for which the company was formed.”

Judge Dunbar said:

“When we come to think that this preferred distribution is made by the managers, who represent the stockholders who are in no way responsible for the debt, or at least that portion of it which is in excess of their liabilities, why should they, thus disinterested, be allowed to confer these benefits upon favorites to the exclusion of the rights of other honest creditors who have helped to furnish the means which constitute the very fund which is now being distributed to the exclusion of their interests? Certainly, it is but a just provision of law which holds that this fund, under such a condition, must be held intact as a trust fund for the equal benefit of all the creditors.

“If the theory of the appellants were true, that the trustees of a corporation could prefer its creditors, and if they can prefer them at all they can prefer them to the extent of all the funds of a corporation, the Court of Equity, before whom the case was brought

for judgment, would sit helpless and with empty hands; for it would be but a mockery of justice to bring the affairs of an insolvent corporation to a court for adjustment and distribution when all the substance of the corporation had been transferred to the pocket or till of a favored creditor.

“And so it is with the corporations in this state. Parties who deal with these corporations under the law rely exclusively upon the funds of the corporation, recognizing the fact that they have no redress upon the private means of the stockholders; and every principle of fair dealing demands, under such circumstances, that the fund upon which they rely and to which they extend their credit should be held as a sacred trust, and equitably and justly distributed by the court for their benefit.

It may be admitted that in this case Judge Dunbar held that the proof must show (1) the corporation insolvent, and (2) that creditors had reasonable cause to believe that debtor was insolvent; for he said:

“In *Buchanan vs. Smith*, 16 Wall. 277, it was held that the creditor had reasonable cause to believe his debtor insolvent when such state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would lead a prudent business man to the conclusion that he, the debtor, is unable to meet his obligations as they mature in the ordinary course of business.”

But later in *Tacoma Ledger Co. vs. Western Home Bldg. Assn.*, 37 Wash. 467, 79 Pac. 992

(1905), where an insolvent corporation sold its assets to another corporation without making provision for payment of its debts, and the purchaser had no knowledge of either insolvency or of any debts, Judge Dunbar said:

“If the corporation was in failing circumstances at the time of the transfer, the answer of the defendant that it was not aware of the indebtedness, will not avail it. For, with or without that knowledge on the part of the appellant, the property of the corporation is still a trust fund for the benefit of creditors.”

Since the above decision was rendered in 1905 the court *has always held that knowledge, belief or reasonable cause to believe need not be proved, that the good faith of the creditor is immaterial.*

In *Jones vs. Hoquiam Lbr. & Shingle Co.*, 98 Wash. 172, 167 Pac. 117, the Klipsun Lbr. Co. was unable to meet its debts as they matured in the ordinary course of business and transferred a piece of land worth \$650 in payment of a debt of \$650 on September 28, 1914. The company continued to do business as a going concern until August 31, 1915, and according to the briefs filed in that case the Klipsun Lumber Co. transacted \$100,000 worth of business after said transfer on September 28, 1914, and before the appointment of a receiver on August 31, 1915.

There was no finding that the creditor knew, believed, or had reasonable cause to believe that the Klipsun Lumber Co. was insolvent. Defendant contended the transfer was in good faith on the part of both debtor and creditor and that it had no knowledge of insolvency and that, therefore, there was no preference under the law of Washington.

Judge Holcomb answered this argument as follows:

“This court, since the case of *Thompson vs. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, has adhered to the doctrine that, although a private debtor may prefer creditors even to the exhaustion of his property, this will not do in the case of an insolvent corporation, *no matter what the good faith of its creditors is*; that, when a corporation has reached a point where its debts are equal to or greater than its property and it cannot pay in the ordinary course and its business is no longer profitable, it ought to be wound up and its assets distributed; that no device can receive the countenance of the courts which provides for an indefinite continuance of its corporate life against the protests of those who are entitled to share in its property, be it large or little. The doctrine of that case was discussed and reaffirmed in *Conover vs. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810, and has been repeatedly adhered to by this court down to *Benner vs. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914-D, 702.” (Italics ours.)

In *Benner vs. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, the Gawley Foundry & Machine Works, on July 9, 1909, gave a bill of sale to the bank of a coasting vessel for the sum of \$5,000, to apply on its account. The company continued to do business and was a going concern until it was adjudged a bankrupt on January 19, 1910. The court said:

“The machinery company was in *straightened circumstances* long prior to its settlement with the appellant bank, a condition which the officers of the bank knew, although they may not have known its exact situation. It was found by the trial court, and we think the evidence justifies the finding, that the machinery company was, at the time of the settlement, *wholly insolvent*, that its assets did not exceed \$20,000, while its liabilities exceeded \$100,000. Later on, actions were started against the machinery company by certain of its creditors, in one of which a default judgment was entered.

“In this state it is the rule that a domestic corporation cannot, after insolvency, prefer its creditors; but, on the contrary, its property is from thenceforth regarded as a trust fund for the benefit of all its creditors, and any transfers or mortgages thereof after insolvency, which have the effect of preferring one creditor over another, are void.”

In *Williams vs. Davidson*, 104 Wash. 315, 176 Pac. 334, the trustee in bankruptcy sued to recover

preferences prohibited by the Bankruptcy Act and by the state law. The court held there was no proof of "reasonable cause to believe" and hence a case was not made out under the Bankruptcy Act. The court then said:

"However, appellant's right of recovery is not limited to the bankruptcy law, but if the transfer is preferential and void under the law of this state, he is entitled to recover. The trust fund doctrine, as applied to insolvent corporations, was announced by this court in *Thompson vs. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, and was exhaustively discussed, considered and reaffirmed in *Conover vs. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810, and has been followed in an unbroken line of decisions ever since that time. So that if anything may be said to be settled, this doctrine has become the settled law of this state, and we cannot depart from it. The trust fund doctrine, from first to last, is to the effect that the property and assets of an insolvent corporation constitute a trust fund in the hands of the managers of the corporation for the benefit of each and all of its creditors ratably, and although a private debtor may prefer creditors, even to the exhaustion of all his assets, an insolvent corporation will not be permitted to do or suffer anything which will permit one or more creditors to obtain a preference, no matter *what the good faith of such creditors may be.*" (Our italics.)

In *Nelson vs. Svea Publishing Co.*, 178 Fed. 136, Judge Hanford said:

“The rule deducible from the decisions of the State Supreme Court is this: The assets of an insolvent corporation constitute a trust fund for the payment of its debts, in which all of its creditors are entitled to share ratably; and preferences given voluntarily by an insolvent corporation are void, as to non-preferred creditors.”

14-a C. J. 898 says:

“The rule denying the right to prefer creditors has been held to apply without reference to the want of knowledge on the ‘part of the preferred creditor of the character of the transfer and of the financial condition of the corporation, although as to this, there is contrary authority.’ ”

Sustaining the text in *Furber vs. Williams Co.*, 21 S. D. 228, 111 N. W. 548, 8 L. Rans. 1259; *Jones vs. Hoquiam Lbr. Co.*, 98 Wash. 172, 167 Pac. 117; *Thompson vs. Huron Lbr. Co.*, 4 Wash. 600, 30 P. 741, 31 P. 25. The contrary authority is *Ford vs. Lamson*, 17 Ohio Cir. Ct. 539.

INSOLVENCY UNDER STATE LAW.

So far as the rights of creditors are concerned, a corporation is insolvent under the laws of the State of Washington when it is unable to meet its bills as they mature in the ordinary course of business.

Thompson vs. Huron Lbr. Co., 4 Wash. 600,
30 Pac. 741, 31 Pac. 25.

Nixon vs. Hendy Mach. Wks., 51 Wash. 419,
99 Pac. 11.

Ronald vs. Schoenfeld, 94 Wash. 238, 162
Pac. 43.

Simpson vs. Western Hdw. & Metal Co., 97
Wash. 626, 167 Pac. 113.

Jones vs. Hoquiam Lbr. & Shingle Co., 98
Wash. 172, 167 Pac. 117.

Williams vs. Davidson, 105 Wash. 315, 176
Pac. 334.

In the *Jones* case the court said:

“The test of insolvency of a domestic corporation in this state is not the same as the test under the federal bankruptcy acts. In *State ex rel Strohl vs. Superior Court*, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177, where it was alleged that the corporation was insolvent in the sense that it was wholly unable to meet its obligations as they matured in the ordinary course of business, the court, after citing the section of the federal bankruptcy act (30 Stat. L. 544, U. S. Comp. St. 1916, 9585) providing that, ‘A person shall be deemed insolvent whenever the aggregate of his property shall not at a fair valuation be sufficient in amount to pay his debts,’ said:

“‘It will thus be seen that the allegations of the complaint in the suit for the receiver in the case at bar would not conclusively make a case under the federal bankruptcy law,

this court has uniformly affirmed the doctrine that the assets of such a corporation are always a trust fund to be administered in equity for the benefit of creditors ratably and equally.'

"In *Nixon vs. Hendy Machine Works*, 51 Wash. 419, 99 Pac. 11, it was said:

" 'If the . . . company was an independent concern, the evidence plainly shows that it was insolvent in that it was not able to pay its debts in due course of business, and this is the test of insolvency established by this court where the rights of creditors are involved.'

"Such being the rule in this state, and it being well established by the evidence that the Klipsun Lumber Company was insolvent under that rule at the time the conveyances of the real estate was made, the conveyance was conclusively a preference and therefore unlawful, and can be set aside at the suit of the receiver of the insolvent for the benefit of all creditors of the same class."

In the *Ronald* case the court said:

"It is abundantly proven by the testimony of witnesses on both sides, and by the admissions of respondent himself, that the company was not able to pay its debts in due course of business. Such is the test of insolvency adopted by this court."

In the *Simpson* case the court said:

"This court has held that the assets of an insolvent corporation constitute a trust fund for the payment of its debts, in which all of its creditors are entitled to share ratably. Con-

over *vs. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810; *Nixon vs. Hendy Machine Works*, 51 Wash. 419, 99 Pac. 11. And that a corporation that is not able to pay its debts in due course of business is insolvent so far as creditors are concerned, and cannot prefer a creditor. *Nixon vs. Hendy Machine Works*, *supra*; *Ronald vs. Schoenfield*, 94 Wash. 238, 162 Pac. 43. A conveyance by a domestic corporation after insolvency, preferring creditors, is void, as the property is a trust fund for all of its creditors. *Benner vs. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914-D 702."

Claimants knew bankrupt was insolvent as that term is defined in Washington. The Carson, Pirie, Scott & Co. account commencing January 1, 1921, was over one year old and was past due for more than eight months.

Applying the test of insolvency laid down in *Conover vs. Hull*, *supra*, to the Carson, Pirie Scott & Co. account, it is apparent that Carson, Pirie, Scott & Co. knew from its own account that debtor was not paying its bills as they matured in the ordinary course of business; and refused to sell any more merchandise until its account was paid up. Therefore, Carson, Pirie, Scott & Co. knew that this concern was insolvent.

Applying the test of insolvency to the bank, it likewise knew from its own account as well as

from the condition of bankrupt's business, that it could not pay its bills in due course of business and, therefore, knew that bankrupt was insolvent.

But the Supreme Court of Washington, like the court in New York, holds that the good faith of the creditor is immaterial and that proof of reasonable cause to believe is non-essential; that a preference is void whether the creditor knew the concern was insolvent or not.

CONCLUSION.

The trustee believes the ordinarily careful and prudent man, the ordinarily intelligent business man, under the facts and circumstances shown to exist, would have reasonable cause to believe that the bankrupt was insolvent and that shutting off the credit in the one case and the determined stand for payment in the other, etc., etc., was for the purpose of getting the money ahead of the other creditors; that a preference was plainly established under the Bankruptcy Act.

But whether or not these creditors had reasonable cause to believe that the bankrupt was insolvent at the time payments were made, whether

or not creditors acted in good faith in receiving said payments—these terms being interchangeable, according to *Bassett vs. Evans*, 253 Fed. 532 (C. C. A. 8)—the payments made to these creditors were preferences under the law of the State of Washington where insolvent corporations are prohibited from preferring one creditor over another under a sound public policy known as the Trust Fund Theory, by virtue of which the assets of an insolvent corporation are held to be a trust fund for equal and ratable distribution among all the creditors of the corporation.

Trustee respectfully submits that he is entitled to a judgment under the Bankruptcy Act on the facts, or that he is entitled to a judgment on the facts found by the referee and the court as a matter of law under the law of the State of Washington.

Respectfully submitted,

NELSON R. ANDERSON,

Attorney for Trustee.

**United States Circuit Court
of Appeals
For the Ninth Circuit**

In the Matter of
ELLIOTT-O'BRIEN COMPANY, a Corporation,
Bankrupt
S. G. CLIMENSON, as Trustee of ELLIOTT-
O'BRIEN COMPANY, a Corporation, Bankrupt,
Appellant

vs.

CARSON, PIRIE, SCOTT & COMPANY, a Corpora-
tion; COFFMAN, DOBSON BANK & TRUST
COMPANY, a Corporation; BEE NUGGET
PUBLISHING COMPANY, a Corporation,
Appellees

Brief of Appellee
CARSON, PIRIE, SCOTT & COMPANY

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COMPANY, a Corporation; BEE NUGGET
PUBLISHING COMPANY, a Corporation,
Appellees

Brief of Appellee

CARSON, PIRIE, SCOTT & COMPANY

STATEMENT

This is an appeal from a decree of the District Court which affirmed an order of the referee in bankruptcy, overruling the trustee's objections to the claims of Carson Pirie Scott & Company and certain other creditors, and allowing the claims in full.

Certain payments on account had been made to these creditors at intervals during the "four months period," January 10 to May 10, 1921, by the bank-

rupt, a corporation engaged in the retail dry goods business at Chehalis, Washington, which the trustee regarded as preferential under both (a) the Bankruptcy Act, and (b) the law of the State of Washington, as announced in the so-called "Corporation trust fund" doctrine of that state.

These creditors having submitted themselves to the summary jurisdiction of the Bankruptcy Court by filing proofs of their claims, two courses were open to the trustee with respect to the alleged preferences; either to proceed by a plenary suit for the recovery of the alleged preferences, or to seek their surrender as a condition to the allowance of the claims by filing objections to the claims. The trustee elected the latter course, interposing objections in which he alleged that the payments in question constituted preferences under both the bankruptcy act (Section 60-b) and the state law (trust fund doctrine of the Washington courts).

Appellees contend that where a trustee elects to proceed summarily, as in this proceeding, to compel the surrender of alleged preferences as a condition to the allowance of a claim, rather than by a plenary suit, his rights in such proceeding are governed exclusively by the provisions, and limitations, of sections 57-g and the two sections, 60-b and 67-e, therein mentioned and to be read as parts thereof, which specifically provide for the surrender of certain preferences, limited in all cases, however, to those

occurring within the four months' period and while the bankrupt is "insolvent," as a condition precedent to the allowance of claim.

These provisions of the act, together with the bankruptcy definition of the word "insolvent" as used therein (omitting the portions not applicable here), are as follows:

SECTION 57-g. *"The Claims of Creditors who have received preferences voidable under Section sixty, Subdivision b, or to whom transfers void or voidable under Section sixty-seven, Subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences."*

SECTION 60-b. "If a bankrupt shall have made a transfer of any of his property, **and if, at the time of the transfer** and being within four months before the filing of the petition in bankruptcy, **the bankrupt be insolvent**, and the transfer then operate as a preference, and the person receiving it shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the trustee."

SECTION 67-e. *"And all transfers of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, shall be deemed null and void under this act."*

SECTION 1. "The words and phrases used in this act shall, unless the same be inconsistent with the context, be construed as follows: (15)

A person shall be deemed 'insolvent' within the provisions of this act whenever the aggregate of his property shall not at a fair valuation be sufficient in amount to pay his debts."

Accordingly it is our contention that, in order to sustain his objections to the claim of Carson Pirie Scott & Company upon the theory that the payments in question were "bankruptcy preferences"—using that term, for convenience, to designate voidable preferences as defined in Section 60-b of the Bankruptcy Act, as distinguished from preferences held void or voidable by state law, which for convenience we will designate as "state-law preferences"—it was incumbent upon the trustee to prove the existence of following elements of a "bankruptcy preference," among others, with respect to each of the payments in question at the various dates they were received: (1) that the bankrupt was *then* insolvent; (2) that the payment *then* operated as a preference; and (3) that Carson Pirie Scott & Company *then* had reasonable cause to believe that the bankrupt was insolvent.

The trustee agrees that proof of these elements are essential to the surrender of the payments as "bankruptcy preferences," and contends that they are established by the evidence with respect to each of the payments to Carson Pirie Scott & Company; while we contend that none of them have been so established.

In this connection we further contend that the referee's finding to the effect that the bankrupt was insolvent during the period in which said payments were received, was a mistaken conclusion from the undisputed facts in the record. The referee's finding to that effect (quoted at p. 15 of appellant's brief), was not approved, or referred to, by the District Judge in his decision.

Judge Cushman, however, decided, in confirmation of referee, that the element of "reasonable cause to believe" was not established, saying:

"Under the facts and the evidence, whatever date is fixed upon as that on which solvency ended and insolvency intervened, there is no such knowledge or notice of that fact shown upon the part of the alleged preference creditors as the law requires to deprive them of that advantage which they may have obtained." Cushman, J. (R. 28.)

The parties are not agreed as to the essential elements of proof to support the trustee's further theory that the payments in question were also "state-law preferences," available by him as such under his objections in this summary proceeding. The determination of that question involves, primarily, the inquiry as to whether they were, in fact, "state-law preferences" under the "trust fund doctrine" of the Washington courts; and secondly, whether, if so, they were received under such circumstances as to require their surrender as a condition to the allowance of a claim in bankruptcy.

The trustee contends that the only essential elements of proof to establish these payments as "state-law preferences" are: (1) that they were made while the corporation was insolvent in the sense of inability to pay its debts in the due course of business, and (2) that they operated to prefer the creditors receiving them—and this regardless of any knowledge or notice on the part of the latter as to the financial condition of the debtor. The trustee further contends that, if they are thus established as "state-law preferences," he is entitled (as we understand his argument at pp. 59 to 64 of appellant's brief), independently of the provisions of Sections 57-g and 67-e (quoted *supra*), to have the payments thereupon surrendered in this proceeding as a condition to the allowance of the claims, without any further showing, the trustee basing his right in this connection, as we understand, upon Section 70-e of the act.

We contend, *contra*, that it is not enough for the trustee to show simply that these payments were in fact state-law preferences; but that in order to compel their surrender as a prerequisite to the allowance of the claims, he must go further and prove that they fulfill the conditions specified in Section 67-e, necessary to require their surrender under Sections 57-g and 67-e construed in conjunction, namely, that they were made by the debtor within four months prior to the filing of the peti-

tion against it *and while insolvent*, within the bankruptcy definition of insolvency.

The trustee contends that the evidence in the record establishes all of the payments to Carson Pirie Scott & Company as state-law preferences under the Washington decisions—which we do not concede—and also, that they were made not only within the four months' period—which is admitted—but while the bankrupt was “insolvent” in the bankruptcy sense—which is not conceded.

In our view of the case, six questions are, therefore, presented by this appeal, as will be apparent from the foregoing statement (and in stating them we use the words “insolvent” and “insolvency” as defined in the bankruptcy act), viz.:

1. Was the debtor insolvent at the times the several payments were made?

2. Did each payment at the time it was received then operate to give Carson Pirie Scott & Company a greater percentage?

3. Did Carson Pirie Scott & Company at the time each particular payment was made *then* have reasonable cause to believe that it was receiving a preference?

4. Are the trustee's rights in this proceeding limited to the provisions of Sections 57-g, 60-b and 67-e, construed in conjunction?

5. Is the insolvency of the debtor a necessary element of proof, in this proceeding, in order to require the surrender of a transfer (i. e., payment), held null and void as against creditors by state law?

6. Was each of the payments to Carson Pirie Scott & Company made under such circumstances that it properly could be held null and void as against creditors by the law of the State of Washington, under the so-called "trust fund" doctrine of that state?

The case, so far as the rights of Carson Pirie Scott & Company are concerned, was submitted entirely upon the evidence introduced by the trustee, and without substantial conflict in the evidence. Therefore, the questions of fact presented upon this appeal involve consideration merely of the inferences to be drawn from the undisputed facts.

It will assist the court in the latter connection, we think, if we make somewhat clearer than counsel for appellant has attempted to do in his statement, the arrangements under which the business was being conducted and the extent and sources of knowledge of its financial condition possessed by the various witnesses during the period in question.

FACTS

During the time of these transactions Charles H. O'Brien was, to all intents and purposes, the sole owner of the business, owning, and controlling for himself and others of the O'Brien family, all of its capital stock other than that nominally owned by its active manager, Mr. Elliott, whose stock, however, was in the hands of Mr. O'Brien as collateral

security for certain loans. (R. 46, 47, 69, 70.) Mr. O'Brien had been for many years in the employ of Carson Pirie Scott & Company, but had retired from business life some two years previously, and at the time of these transactions was devoting his time to travel, though he still had a desk in the Carson Pirie Scott & Company offices in Chicago. He was not in Chicago, or the State of Washington, during the period in question, but was in the Bermudas on a pleasure trip. (R. 47.)

About the time of leaving on his trip, in November, 1920, Mr. O'Brien, who it appeared had previously given little attention to the actual conduct of the business, visited Chehalis and conferred with the manager, Mr. Elliott, in regard to its affairs and Mr. Elliott's business plans.

It appears that Mr. O'Brien, not caring to be bothered with this business, which he had inherited from his brother, had been desirous for some time of disposing of his own and the O'Brien family's interest in it, having planned at various times to sell the O'Brien interests to Mr. Elliott, or to someone whom Mr. Elliott could find as a purchaser. (R. 40.)

Ascertaining that, as he thought, Mr. Elliott was carrying too large a stock of merchandise and indebtedness, Mr. O'Brien urged Mr. Elliott to reduce both his merchandise and indebtedness as rapidly as possible, with a view, largely, to getting the

investment reduced to a point that would make the business more readily salable as a going concern. (R. 34, 35, 37, 38.)

Mr. O'Brien took occasion, also, to insist upon an early payment of Mr. Elliott's personal indebtedness to him, presumably, since Elliott had no resources of his own, with the idea of stimulating Mr. Elliott to make financial arrangements to take the business off his hands, or to find a purchaser. (R. 50, 73.)

Mr. Elliott differed with Mr. O'Brien in regard to some features of the latter's plans for conducting the proposed stock reduction sales, and felt aggrieved over the demands made upon him for the payment of his personal indebtedness, with the result that he, at that time, considered severing his connection with the business and finally did so about April 26, 1921, proceeding, however, to carry out Mr. O'Brien's wishes in the meantime. (R. 69, 70, 73, 74.)

Shortly after this visit, Mr. O'Brien made arrangements with Mr. Charles L. LeSourd, the trust officer of the Dexter Horton National Bank of Seattle, to look after the business for him, during his absence on his contemplated trip to The Bermudas.

Mr. LeSourd, who was already familiar with the business, by reason of the fact that his bank had acted as administrator of the estate of its former part-owner, Mr. O'Brien's deceased brother, was

informed of Mr. O'Brien's plans for reducing the stock and merchandise, and agreed as to their advisability from the standpoint of procuring a purchaser for the business, as well as from the standpoint of their sound business policy. (R. 37, 44, 45.)

Presumably anticipating the possibility of Mr. Elliott's leaving the company's employ, and by way of providing for that contingency, Mr. O'Brien and Mr. LeSourd placed Mr. Hart, an experienced dry goods man, who some years previously had been in the employ of Carson Pirie Scott & Company, in the store to assist Mr. Elliott in conducting the contemplated special sales, which were commenced along in December, 1920, and continued at intervals until the appointment of the receiver. (R. 85, 90, 48.)

Mr. Elliott remained, however, as the active manager, personally keeping the books, taking the inventory himself with Mr. Hart's assistance, and generally attending to all the details of the business. Most of Mr. Hart's information as to the financial condition of the business came from Mr. Elliott, who was the one person most intimately acquainted with, and having direct knowledge of, the company's finances during the period in question. Both Mr. Elliott and Mr. Hart reported to Mr. LeSourd from time to time, and conferred with him in regard to the business.

On reaching Chicago, on his extended trip, Mr. O'Brien further arranged to have Mr. Coram T. Davis, a personal friend and an attorney in the offices of Carson Pirie Scott & Company, in Chicago, look after his business affairs in his absence. Mr. O'Brien thereupon wrote to Mr. LeSourd to that effect, requesting him to advise with Mr. Davis on any matters of importance in regard to the store. (R. 37.) So far as appears in the record, Mr. Davis was acting solely in the interest of the owner of the business, Mr. O'Brien, and not in the interest of Carson Pirie Scott & Company, in conducting the correspondence which he had with Mr. LeSourd and Mr. Elliott, a portion of which was introduced in evidence by the trustee.

Mr. Davis evidently was conversant with Mr. O'Brien's plans for reducing the merchandise and indebtedness, with a view, ultimately, to disposing of the business, and the correspondence between Mr. Davis and Mr. LeSourd related principally to the prospects of such a sale, the advisability of accepting certain offers which Mr. Elliott and Mr. LeSourd had received from prospective purchasers of the business, and to the collection of Mr. Elliott's personal indebtedness to Mr. O'Brien. (Trustee's Exhibit "A," R. 115.) Aside from a certain financial statement which Carson Pirie Scott & Company received from the debtor corporation during the period in question, copies of which are among

the exhibits, the only information relative to the debtor's financial condition claimed by the trustee to have been received by this creditor and appearing in the record, was that contained in the letters received by Mr. Davis from Mr. LeSourd.

ARGUMENT

I.

As Bankruptcy Preferences

The payments on account to Carson Pirie Scott & Company were received on the dates and in the amounts, as follows, all of them within the "four months' period":

Jan. 25, 1921.....	\$ 265.50
27, 1921.....	495.55
Feb. 4, 1921.....	517.54
24, 1921.....	661.59
Mar. 5, 1921.....	715.80
Apr. 1, 1921.....	589.66
25, 1921.....	500.00
29, 1921.....	508.47
	<hr/>
	\$4,254.11

It is a well settled rule that each payment, in a series of payments on account alleged to be preferential, is to be treated as an independent transaction; and that the burden of proof is upon the

trustee to show the existence of the essential elements of preference with respect to each particular payment, at the time it was made. The rule is clearly stated in *W. S. Peck & Co. v. Whitmer* (C. C. A.), 231 Fed. 893, 896, a case involving payments on account, made a week or more apart during the four months' period:

"Therefore the burden of proof was upon the trustee to show by a fair preponderance of the evidence (1) that the bankrupt was insolvent at the time the *several* payments were made; (2) that the payments so made enabled appellants to receive a larger percentage of their respective debts than any other creditor of the same class; (3) that *at the time each particular payment was made* appellants had reasonable cause to believe that the enforcement of the payment or transfer would effect a preference."

The importance of bearing this rule in mind in the consideration of this case is apparent, in view of the fact that the payments to Carson Pirie Scott & Company were made at intervals extending over several months in the early part of the year 1921, when the period of drastic deflation following the war was at its height and merchandise values throughout the country were very uncertain and dropping rapidly almost from day to day.

As stated by Mr. Elliott in his testimony, "The merchandise was really receding every month." (R. 75.) So that the financial condition of the debtor, as measured by changing value of its mer-

chandise stock, probably was not the same on the dates of any two of these payments.

As it is conceded that in order to compel the surrender of these payments as bankruptcy preferences within the definition of Section 60-b, in this proceeding, it was necessary for the trustee to prove the elements of: (a) insolvency, (b) greater percentage of payment, and (c) reasonable cause to believe, we will discuss briefly the evidence bearing upon them, in the order named.

(1) WAS THE DEBTOR INSOLVENT AT THE TIMES THE SEVERAL PAYMENTS WERE MADE?

The answer to the question is found in the fact that the evidence introduced by the trustee, which stands uncontradicted in the record, positively and affirmatively shows that the bankrupt was solvent, in the bankruptcy sense of having an excess of assets, throughout the period of the payments to Carson Pirie Scott & Company, as the following brief analysis of the evidence will demonstrate:

Disregarding, for the moment, whatever evidence there may be in the record as to the value of the assets and the amount of liabilities on any date or dates subsequent to April 29, 1921, the date of the last of the payments in question to Carson Pirie Scott & Company, and confining our inquiry to the period during which those payments were

made and prior thereto, let us turn to the showing of the debtor company's assets and liabilities up to the date of the last payment, as shown by the evidence introduced by the trustee:

It will be recollected in this connection that Mr. Elliott, the manager, and a witness in behalf of the trustee, was the one person, as the record shows, who purported to have direct and intimate knowledge of the debtor company's financial condition. He had had the sole conduct of the business since its inception in 1917, as one of the original incorporators and its secretary-treasurer and manager, (R. 46, 69), which meant that he personally had purchased the merchandise on hand during the period covered by these payments and had better means of knowing its quality and value than any outsider could have had. Also he personally kept the books; and it was in connection with his testimony that all the books and statements showing the financial condition of the debtor company were identified, explained and introduced.

No other witness was examined, or testified, as to the amount or value of the assets or liabilities as they existed during this period.

So that his testimony in that regard stands undisputed and uncontradicted in the record, as does the data disclosed by the said books and statements.

What, then, are the undisputed facts so shown?

First, that the debtor company had a *net worth of \$14,230.35, on December 31, 1921*, as shown by the entries in its trial balance book (Trustee's Exhibit "B"), of that date, and the statement of December 31, 1920 (Respondent's Exhibit "No. 2," R. 162), and *based upon an actual inventory* made by Mr. Elliott in the usual course of business, which he testified he was very careful in taking, as nearly as he could *at market values*, writing off from the various inventory sheets, after they were first totaled, some \$2,500.00, by making reductions on different items, so that "when completed the inventory was really placed at the market value." (R. 67, 68.)

This was a few weeks prior to the first payment to Carson Pirie Scott & Company.

Second, that the debtor company had a *net worth of \$2,945.07 on April 26, 1921*, as shown by the entries in its trial balance book (Trustee's Exhibit "B"), of that date, and *based upon an actual inventory* made by Mr. Elliott between the dates of April 23 and 26, just prior to his leaving Chehalis, concerning which he testified:

"I took the inventory on April 23, on exactly the same basis as before (referring to the previous inventory above mentioned), only did not go over it again and mark it down, but took it at what I thought was the *market price*." (R. 68.)

This was only three days prior to the last payment to Carson Pirie Scott & Company.

Third, that at the close of each of the intervening months the debtor company had a net worth as shown by the entries made by Mr. Elliott in its trial balance book (Trustee's Exhibit "B", R. 152), as follows:

"Net Worth."

"January	\$11,752.98"
"February	11,608.85"
"March	11,444.97"

which, Mr. Elliott testified, necessarily involved estimated inventories, made by him at "a reduction of 30% to 25%," for those three months, since no actual inventories were taken during those months, but which, as he also testified, were otherwise based on actual figures (R. 53, 54), and, therefore, represented correctly the company's financial condition, as nearly as Mr. Elliott could arrive at it without an actual inventory.

As against this positive evidence, relating directly to the period in question, affirmatively showing solvency, and binding upon the trustee since it was introduced on his behalf, how can he be heard to contradict it by inferences deduced from the amount of the receiver's inventory, or of the amount realized at the bankruptcy sale?

But if that were permissible under the rules of evidence—and we respectfully submit the contrary—how can it be argued with any degree of per-

suasiveness that the receiver was any more competent to judge of the value of that particular stock than Mr. Elliott, the man who had purchased it and handled it and possessed a detailed knowledge of its quality and value? Mr. Walker testified (R. 82), that he had been in the retail mercantile business for a good many years and had been assessing merchandise stores in Lewis County for a number of years, which he said gave him "quite an inside knowledge of merchandising." (R. 82.) He does not say how recently he had been in the retail business or whether in a similar, or different, line to that of the debtor. But it is difficult to see how his duties as assessor in Lewis County would better qualify him to judge of the fair market value of this particular stock than Mr. Elliott, who had been actively engaged in the dry goods business, wholesale and retail, for about fourteen years immediately preceding.

Also we think the court will take judicial knowledge of the commonly recognized tendency of both tax-assessors and receivers to under-value rather than over-value stocks of merchandise.

Judging from the ordinary experience in bankruptcies, the fact that this estate "came over into bankruptcy with an inventory valuation of approximately \$12,000 and a proved indebtedness of approximately \$16,000 and immediately sold for \$11,000 net—after just having gone through a so-called

“closing out sale” which counsel for appellant describes in his brief (p. 47) as one of “slashing prices, through a special sales agent, under heavy pressure,” and which evidently left the stock, as Mr. Walker, the receiver, testified, in a badly demoralized condition with staple articles like sheetings and gingham all gone, with broken lines in nearly every department, with unseasonable articles left on hand, and others more or less damaged and showing the effect of improper handling by unexperienced sales people (R. 83), and after undergoing in addition to that the “shock and shrinking process” of a state court receivership, followed by bankruptcy—the very fact, we suggest, that the assets after encountering such a demoralizing ordeal immediately preceding bankruptcy, thereupon sold for \$11,000 net, or approximately 70% of the proved indebtedness of \$16,000, indicates conclusively, in our view, that the fair market value of the assets, while the debtor company was still a going concern, was more than sufficient to cover its liabilities. And particularly so, in view of the additional fact that the receiver’s sale occurred at a time of serious financial depression, when buyers of merchandise stocks would be comparatively few and cautious in bidding. This view seems to be substantiated by the fact that the purchaser at the receiver’s sale afterward told the latter “that he had done better than he had expected.” (R. 84.)

It is clear, we think, from the foregoing analysis of the undisputed evidence, not only that the trustee has established the fact of solvency throughout the period of the payments to Carson Pirie Scott & Company by affirmative evidence which precludes him from urging mere inferences from other evidence in the record, and relating to a time subsequent to the period in question when the entire situation was radically changed, to overcome it; but that there are, indeed, no such legitimate inferences to be drawn.

It is true that the referee found that the bankrupt was insolvent.

It is the recognized rule, however, that where the finding of a referee is a deduction from established facts or uncontradicted testimony, not involving questions of credibility, neither the District Court on review, nor the Circuit Court on appeal, is bound by the referee's finding; but, having the same facts before it, either court is at liberty to draw its own conclusions. *Walter v. Atha*, (C. C. A.), 262 Fed. 75, 45 Am. B. R. 365; Collier on Bankruptcy (1921 Ed.), p. 605.

In stating his conclusion on the question of solvency, the referee said: "I have no doubt *from this resume of the figures* that the bankrupt was insolvent in December, 1920," (R. 21), referring to certain figures of the company's indebtedness, sales, purchases, inventory, net worth and operating ex-

penses during the four months' period, which were taken by the referee, as he states, from the company's records as testified to by Mr. Elliott, together with the amounts of the receiver's inventory and sale of assets and of the proved debts, all of which figures are set out by the referee in the preceding paragraphs of his certificate.

And in the paragraph immediately following the statement of his conclusion as above, the referee by a computation of his own, from figures of the bankrupt's merchandise, and bank indebtedness, inventory and fixtures, as he understood them to exist in December, explains how he arrived at his conclusion of insolvency as follows:

"In December, 1920, the bankrupt owed for merchandise about \$16,240.92 and owed the bank \$5,500.00, making a total known indebtedness of \$21,740.92. Its inventory taken about December 31, 1920, was about \$26,371.39, about \$4,000.00 of which covered fixtures, leaving the net stock about \$22,371.39, or about \$630.47 more than the known debts. It would cost, and did cost, more than \$630.47 to convert the stock into cash for the payment of debts. In fact it cost about \$12,000, *so that* insolvency existed then and never got any better." (R. 21.)

It will be observed that the figures used by the referee in this computation must have been taken from the face of the bankrupt's books of account, since the books, with the witness Elliott's explanation of the entries therein, are the only source of such information in the record; and that the referee,

although he uses the rather indefinite expression, "in December," clearly intended this computation to relate to the close of that month, since he uses the inventory "taken about December 31, 1920," as the basis of his comparison of assets with liabilities.

It would be expected, therefore, unless there is some mistake in the figures used by the referee, that the result reached by him would not differ widely from the net worth on December 31 as shown by the books. But the referee in his computation arrives at a net worth of only \$630, as compared with the net worth of \$14,230 shown by the books (see statement of December 31, 1920, Respondent's Exhibit "No. 2," R. 162), a discrepancy of \$13,600, which is only partly accounted for by the fact that the referee expressly eliminates from his consideration, as part of the assets—and clearly improperly, we need hardly suggest—fixtures to the extent of about \$4,000.

Thus there is still an unexplained discrepancy of about \$9,000 between the referee's computation of net worth on December 31 and the net worth as shown by the books for that date.

A comparison between some of the figures used here by the referee and the corresponding items as shown by the company's said statement of December 31, 1920, as tabulated below, makes it clear that the referee used the wrong figures in his computa-

tion and thereby reached an entirely mistaken conclusion :

Items—	Referee's Figures.	Figures per Statement.
Owing for merchandise. .	\$16,240.92	\$12,958.11
Owing to bank	5,500.00	5,792.89
Total indebtedness	21,740.92	18,751.00
Inventory—		
Merchandise	22,371.39	27,862.25
Fixtures	4,000.00	3,520.22
Net worth	630.47	14,230.35

We have been unable to discover from the record where in the company's books the referee obtained the figures he uses, but we are inclined to think that he inadvertently took the items of indebtedness shown by the trial balance book as of some other date than December 31, possibly as of the first of the month instead of the last.

But however the mistake may have occurred, it is clear, we think, for the reasons we have pointed out, that the referee was wrong in his calculations, resulting in a mistaken conclusion of insolvency in his findings.

(2) DID EACH PAYMENT AT THE TIME IT WAS RECEIVED THEN OPERATE TO GIVE CARSON PIRIE SCOTT & COMPANY A GREATER PERCENTAGE?

Whether or not any one of the creditors, including Carson Pirie Scott & Company, in accepting a payment in full, or on account, on any one of the

dates on which a payment was made to Carson Pirie Scott & Company, then received a preference, obviously depends first of all upon the fact of solvency or insolvency on that particular date.

If the debtor was then solvent and distribution was immediately made, no creditor would be at a disadvantage.

But assuming that insolvency appeared, it would still be necessary to ascertain whether the payment to a particular creditor on that date amounted to a greater percentage of his then claim than the percentage received by any other creditor on the same date on his then claim. The essential factors in this problem would be: (1) total assets, (2) total liabilities, (3) amount of each claim, (4) amount of each payment—*on the particular date*.

We are unable to find this requisite data in the record, as of any one of the dates of payment to Carson Pirie Scott & Company, and therefore submit that the trustee has failed to sustain the burden of proving this admittedly essential element of a "bankruptcy preference" with respect to any of said payments.

(3) DID CARSON PIRIE SCOTT & COMPANY AT THE TIME EACH PARTICULAR PAYMENT WAS MADE THEN HAVE REASONABLE CAUSE TO BELIEVE THAT IT WAS RECEIVING A PREFERENCE?

The rule as to what will and will not constitute knowledge of the fact of a preference, is very concisely stated in the opinion of Archibald, J., *In re Coder v. McPherson*, 152 Fed. 951, 953; 89 C. C. A. 99, quoted in appellant's brief, as follows:

"Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of *all the facts which a reasonably diligent inquiry would disclose.*" (Italics ours.)

What would incite the ordinary business man to inquiry; what would constitute a reasonably diligent inquiry; and what such inquiry would have disclosed, depend, of course, upon the circumstances of the particular case.

Knowledge which would incite inquiry in one instance may be overcome by the existence of additional information in another instance. As said by Judge Archibald, in concluding his opinion in another very carefully considered case, stronger against the creditor, we think, on the facts, than the instant case:

"No doubt in the present instance Allendar (the creditor) was anxious over his debt, and pressed for its payment, and may have ex-

pressed apprehension with regard to it. But this is not to be carried too far, or made to operate too strongly against him, *particularly in view of the assurances which he had received from those best calculated to know*, on which he had the right to rely, to the contrary."

In re Wolff, 164 Fed. 449, 458.

In that case the creditor had pressed for payment; had threatened suit; had been told by an officer of the debtor company that the company was indulging in operations the outcome of which was not encouraging; had expressed doubt as to the safety of his loan; had been told by an officer of the company that his debt was not paid because the company "had no money"; knew that a reorganization scheme had fallen through; had been promised payment within ten days and on the failure of the company's representative to meet an appointment to carry out that promise, had threatened suit; had been told that if he sued it would precipitate matters and that he and other creditors would get less, but that if he waited he would get his money; and within a couple of days thereafter, the money not being forthcoming, he accepted an assignment of an account as security. On the other hand he had been assured by the president, as a personal friend, of the safety of his debt, with plausible explanations of the company's difficulties.

The court, after reviewing the facts in his opinion, substantially as above, said:

"While, then, there may have been abund-

ant signs of embarrassment, the same cannot be charged as to insolvency. The most that can be said is that there was enough to put Mr. Alendar (the creditor) on inquiry. But where could he inquire that he had not? Or *what further could he hope to elicit?* . . . Nor can he be charged with notice that the condition of the company was other or different than had been so represented to him (referring to the assurances given him of the safety of his debt). . . . The special master has made an admirable report, from which I may well hesitate to differ. . . . But he was particularly mistaken, as I am constrained to feel, in holding that, all things considered, there was reasonable cause to believe that the company was insolvent, so as to make the transfer of the security in question a preference *which further inquiry if prosecuted, would have disclosed.*" *In re Wolff, supra.*

While the facts inciting to inquiry are so much stronger in the *Wolff* case than in the instant case that it cannot be maintained here with any degree of reason, in the light of that ruling, that Carson Pirie Scott & Company was put upon inquiry, let us turn now to the undisputed facts in this record for the purpose of ascertaining *what a reasonably diligent inquiry would have disclosed* to Carson Pirie Scott & Company, assuming, but by no means admitting, that they were indeed put upon inquiry.

"A spring can rise no higher than its source."

Mr. Elliott was the most authentic, and the ultimate, source of information in regard to the com-

pany's affairs, and the one person of whom inquiry naturally would have been made. The evidence shows that he is a thoroughly experienced dry goods man, in whom Carson Pirie Scott & Company had every reason to place confidence. His testimony will impress the court, we think, as having been given freely and with every indication of candor. It is not impeached or contradicted. The trustee vouched for him, as his witness.

Mr. Elliott's testimony clearly indicates that he himself believed that the inventories he took, at the beginning and close of the period in question, were correct (R. 54), and based upon market values (R. 67), and that he, therefore, must have believed that the business was solvent, since the trial balances based upon those inventories showed it to be solvent.

Mr. LeSourd, the trust officer of one of Seattle's leading banks, and whose testimony in this matter is, we suggest, of particular value and entirely trustworthy, testified, in response to a question asked him by counsel for the trustee, that "neither Elliott nor O'Brien had any idea in their minds, from what they said (in December) that the company was insolvent at the time—never mentioned it." (R. 38.) Further on Mr. LeSourd testified, on cross-examination, to the effect that as late as May 2, "neither Mr. Elliott nor Mr. O'Brien, so far as he knew, had any idea that the store would be

closed at that time," but that they "expected it would be continued as a going concern." (R. 44.)

Thus it appears from Mr. LeSourd's testimony, as well as from Mr. Elliott's, that Mr. Elliott himself believed up to the time he left Chehalis, that the business was solvent and would continue as a going concern. And it cannot be presumed that he would have informed Carson Pirie Scott & Company to the contrary. The company's books, if this creditor had requested to see them and Mr. Elliott had seen fit to comply with such a request, would have confirmed Elliott's opinion that the debtor company still was solvent. They would have shown a net worth ranging from \$14,000 to \$11,000 on any day Carson Pirie Scott & Company might have made inquiry up to April 27, the day following the completion of the last inventory, and they had no occasion to inquire then, because Mr. LeSourd's letter of April 23 clearly indicated that they would be advised of the company's actual condition when that inventory was completed.

Elliott testified also that at no time, up to the time he left in April, was any creditor seeking to enforce its claim by law (R. 74); and he naturally would have informed Carson Pirie Scott & Company of that assuring circumstance.

So that neither inquiry of Elliott nor an examination of the books would not have disclosed an

excess of liabilities over assets during the period in question.

If a representative of Carson Pirie Scott & Company had talked with Mr. Hart, he would have been informed by the latter, according to Hart's opinion as testified to in this matter, up to the date of the appointment of the receiver, that, in his opinion, "the capital stock still had value," and that he "still had faith in the store." (R. 92.)

If their representative had inquired of Mr. LeSourd, who was keeping in close touch with the company's affairs, as the personal representative, locally, of the owner of the business, Mr. O'Brien, he would have learned from him—judging by Mr. LeSourd's testimony, and the letters and telegrams he was sending to Mr. Davis, as Mr. O'Brien's "personal representative" in Chicago (R. 37)—that he did not know of any creditors who were trying to enforce their claims or who entertained a wish to do so (R. 44). If such inquiry had been made as late as March 12, the time of the "Worth offer," Carson Pirie Scott & Company would have been told by Mr. LeSourd that he considered that 90 per cent of the stock of merchandise then on hand at the then replacement values "*would at least pay the debts* and possibly a little on the capital stock." (R. 39.) And the investigator could not have learned from Mr. LeSourd until as late as May 2, after all the payments had been made, that insolv-

ency existed; for Mr. LeSourd testified that "the first knowledge" he "ever had that the store was insolvent" was on that date (R. 41).

If inquiry had been made, as late as the latter part of March or early in April, of the Western Dry Goods Company, in Seattle, one of the largest creditors, and if that company had seen fit to inform him of the facts as they appear in the record he would have learned that their credit man, Mr. Beamer, was then satisfied with the Elliott-O'Brien Company's situation as he had recently found it after personally visiting the store, looking over the merchandise and talking with the manager, Mr. Elliott. (R. 72-73.)

If inquiry had been made of the debtor company's bankers in Chehalis, Carson Pirie Scott & Company would have learned from them, down to as late as May 3 or 4 (after all the payments in question had been received by Carson Pirie Scott & Company), that so far as they knew the debtor company was solvent and in no difficulty, and that the bank was carrying their account practically in the same amount as it had for years (R. 107-108), and that, notwithstanding the "closing out sales" which they were advertising, it was not generally understood locally that the company was going to close its business—not unless they found a purchaser (R. 109).

Clearly this would have constituted a reason-

ably diligent inquiry on the part of this creditor and the facts and opinions so received in response to it certainly would not have warranted the conclusion that the debtor's liabilities exceeded its assets, but would have led to the opposite conclusion.

Appellant does not claim that Carson Pirie Scott & Company had any information specifically to the effect that the debtor company's liabilities exceeded its assets; nor does he attempt to show that reasonable inquiry on its part would have disclosed such a condition at the time of any of the payments. On the contrary the evidence introduced by him showed that at the beginning of the four months' period this creditor was furnished (R. 115) with a statement (Respondent's Exhibit No. 2), of the assets and liabilities, showing a net worth of more than \$14,000; and the very communications of Mr. LeSourd to Mr. Davis, introduced by the trustee, upon which appellant's counsel places so much stress as containing notice to Carson Pirie Scott & Company of a possible or impending receivership (and therefore of insolvency, as counsel would have the court infer), in each instance contained other information, of a reassuring nature, specifically upon the subject of the debtor's assets and liabilities, viz.: The telegram of March 12 stated that Elliott showed assets and liabilities as listed in the telegram, the totals of which gave a net worth of \$9,650 (R. 129); the letter of March

16 stated that "the stock is evidently worth somewhat in excess of the debts," and that in addition there were the "fixtures carried on the books at between \$3,000 and \$4,000 (R. 123-124), and the letter of April 23, which reached Carson Pirie Scott & Company about two days before the last payment, stated the approximate total of the liabilities and contained the information that an inventory was to be taken beginning the next day which would enable the true condition to be determined (R. 149-150).

The above mentioned communications contained the only information shown by the record to have been received by this creditor as to the debtor's assets and liabilities during the period in question.

As against this positive information that the debtor's assets were in fact in excess of its liabilities, what does the trustee urge as showing notice to Carson Pirie Scott & Company to the contrary?

First there are the communications of Mr. LeSourd just referred to, viz., the telegram of March 12 in which he advised: "Fear receivership if business drifts along"—this accompanied by a summary of the assets and liabilities, listed in the same telegram, showing a net worth of \$9,650—(R. 120); the letter of March 16, advising "this (reducing the stock to ten or fifteen thousand dollars by selling it gradually to customers) is probably going to be difficult to accomplish as someone *might* step in

and demand that a receiver be appointed”—this accompanied by Mr. LeSourd’s opinion that there was “no object in giving the stock away” (to a purchaser at less than 100 cents on the dollar), and that “the stock is evidently worth somewhat in excess of the debts”—(R. 123-124) ; and the letter of April 23, advising, “*If* it seems impossible for the store to pay its debts we will suggest that all stock be turned over to the creditors at once”—accompanied by the information that an inventory was about to be taken, commencing the next day, which would determine that question. (R. 149-150.)

Aside from these advices of the possibility of a receivership, which of themselves manifestly do not convey the impression that the debtor company was insolvent in the sense of having less assets than obligations, and more particularly because the first two contained specific information to the contrary, and the last showed that those in charge of the store did not themselves know the true condition at the date of writing but were taking an inventory to ascertain, and would act accordingly—the only other circumstances urged by appellant as constituting notice of insolvency are: The intimate relation between Mr. Elliott and the O’Briens with Carson Pirie Scott & Company, the liberal extension of credit by this creditor to the debtor and their extensive dealings in the past, the business depression, the fact that some of this creditor’s bills

were more than one year old, and that they knew that fact, the refusal of this creditor in February to sell the debtor any more goods on credit, the disagreements between Mr. Elliott and Mr. O'Brien and the fact that by reason of Mr. Elliott's application for a position in their employ in March Carson Pirie Scott & Company knew that he intended to give up his position with the debtor corporation while Mr. O'Brien was in the Bermudas, the fact that Carson Pirie Scott & Company afterward took Mr. Elliott back into their employ, the fact that this creditor knew that the debtor was running continuous sales and was seeking a purchaser for the business. (Appellant's Brief, pp. 33-39.)

It may be observed by way of passing comment on these circumstances, that:

With respect to the alleged intimate relationships between Elliott, the O'Briens and Carson Pirie Scott & Company; the facts are that one of the O'Briens had been deceased for over a year, the other was in the Berumdas and knew nothing about the financial condition of the store during these four months, and Elliott had not been connected with Carson Pirie Scott & Company for a matter of four years. So far as that past relationship had any bearing, it doubtless tended to make Carson Pirie Scott & Company rely the more implicitly upon the information it received to the effect that the assets were in excess of the liabilities.

The fact that, after extending a liberal line of credit during the period of war-inflation—during which the debtor took advantage of discounts with practically all its other creditors and of being permitted to pay its bills to Carson Pirie Scott & Company at its convenience with interest—this creditor, during the subsequent period of deflation, along with other wholesale houses throughout the country, insisted upon debtor's carrying a more reasonable stock of merchandise and getting back to "normalcy" in the payment of its account, as a condition to further purchases on credit, would not indicate, by any means, that Carson Pirie Scott & Company had reason to believe the debtor insolvent, but rather that it was seeking merely to get its dealings with the debtor back to a sound business basis. Doubtless the business depression made that course necessary with other customers generally.

Carson Pirie Scott & Company's knowledge of past due indebtedness owing to it would not necessarily cause it any serious concern, for the simple reason that the debtor's account had been in that condition from the beginning. Mr. Elliott testified that they "had always had a substantial account with the debtor—a big claim past due—ever since the latter began business, and that there was nothing unusual about that past due claim—not after the first six months" (R. 71).

As to Carson Pirie Scott & Company's employment of Elliott and their knowledge of disagreements between Elliott and O'Brien: If Carson Pirie Scott & Company knew of the disagreement, they also must have known that it resulted from Mr. O'Brien's criticism of Mr. Elliott's management in carrying too big a stock and too large an indebtedness, and that Mr. O'Brien had arranged to have a capable man, Mr. Hart, in the store ready to carry out his plans in case of Elliott's resignation, which it appears was under contemplation by Mr. Elliott since November of the preceding year. (R. 50, 71, 73.) Mr. Elliott's application for a return to their employment would not, under such circumstances, indicate that he was leaving the debtor company because he considered it insolvent, as opposing counsel seeks to have the court infer. There is nothing in the evidence, we suggest, to warrant counsel's assertion that Elliott "abandoned" the debtor corporation. On the contrary, it shows that he made arrangements with Mr. LeSourd about turning over the management to his successor, Mr. Hart, and stayed over several days after he had planned to leave and took an inventory.

As to the carrying on of special stock reducing sales by the debtor advertised as "closing out sales": Upon appellant's theory that the information contained in Mr. LeSourd's letters to Mr. Davis thereby came within the knowledge of Carson Pirie

Scott & Company, they knew that the object of those sales was to reduce the merchandise stock and indebtedness to a point where a purchaser for the business as a going concern could be more readily obtained. Also this was in accordance with the return to a sound business policy upon which Carson Pirie Scott & Company was insisting with respect to its account. The sales as well as the fact that a purchaser for the business was being sought, were advertised openly in the newspapers. They did not incite any of the Seattle or Portland creditors to make inquiry (R. 91). On the contrary, it appears that Mr. Beamer, the representative of the Western Dry Goods Company of Seattle, one of the largest creditors, on visiting the store late in March or early in April, was informed of the special sale about to be put on in April and that Elliott thought they would "take care of everybody," whereupon Mr. Beamer "expressed his satisfaction." (R. 73.)

Counsel for appellant in his brief (pp. 32-33) contends that the fact that Carson Pirie Scott & Company did not offer any of the correspondence exchanged between it and the bankrupt establishes an inference of law "that such evidence, if produced, would have been fatal to its case," meaning, we take it, that such correspondence would show conclusively that Carson Pirie Scott & Company had "reasonable cause to believe." (How it could be "fatal" to Carson Pirie Scott & Company's case is difficult to un-

derstand, since it could have a bearing only on the element of "reasonable cause to believe.")

We have examined the decisions cited by appellant in support of this contention and find that they are not in point, for the reason, among others, that they relate to oral testimony rather than to documentary evidence, with respect to which a somewhat different rule seems to obtain, due to the fact that a document speaks for itself and can be availed of by an adverse party without the risks attending the examination of an adverse or hostile witness.

While the true rule as to presumptions arising from non-production of evidence does not go to the extent of an inference that if produced the evidence would be "fatal" to the party's contention, but only to the extent that it would be unfavorable, the rule, it seems, does not apply in cases where, as here, no notice to produce documentary evidence has been given:

"(2) *Non-production of Documents*: Where a party to judicial proceedings suppresses documents which are relevant to the matter in question and within his control, . . . there is a presumption that the suppressed evidence would injure his cause.

"*Notice to Produce*: The unfavorable inference is especially applicable where the party withholding has had notice or has been ordered to produce documents in his possession; and conversely, it has been held that *unless the party desiring the production of documentary evidence gives notice to the party in whose possession it is to produce it*, no unfavorable presumption or

inference can arise from its non-production.”
22 C. J. 114.

(Citing *Watkins v. Pintard*, 1 N. J. L. 432;
Sullivan v. Cranz, 21 Tex. Civ. App. 498, 152 S.
W. 272; *Rochester Ins. Co. v. Monumental Sav.
Assn.*, 107 Va. 701, 60 S. E. 93.)

No notice to produce the correspondence referred to was ever given, nor was its production ordered or requested, as the record will show.

With respect, therefore, to the contention of appellant that the payments to Carson Pirie Scott & Company constituted voidable preferences within the meaning of Section 60-b of the Bankruptcy Act, and that, as such, their surrender was required under the trustee's objections in this proceeding; we respectfully submit that the trustee not only has failed to sustain the burden of proving any of the three essential elements of such a preference as to any of said payments, but has affirmatively shown the non-existence of all those elements as to each of said payments.

II.

As “State-Law Preferences.”

(4) ARE THE RIGHTS OF THE TRUSTEE
IN THIS PROCEEDING CONFINED TO THE
PROVISIONS OF SECTIONS 57-g, 60-b AND 67-e
CONSTRUED IN CONJUNCTION?

For convenience of reference, we will again quote those sections here, omitting the portions not applicable to this proceeding:

Section 57-g: "*The Claims of Creditors who have received preferences voidable under Section 60, Subdivision b, or to whom transfers void or voidable under Section 67, Subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences.*"

Section 60-b: "If a bankrupt shall have made a transfer of any of his property, and if, at the time of the transfer and being within four months before the filing of the petition in bankruptcy, the bankrupt be insolvent, and the transfer then operate as a preference, and the person receiving it shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the trustee."

Section 67-e: "And all transfers of his property made by a debtor *at any time within four months prior to the filing of the petition against him*, AND WHILE INSOLVENT, which are held null and void as against the creditors of such debtor by the laws of the state, shall be deemed null and void under this act." (Italics ours.)

The bankruptcy act contains various provisions under which the trustee may bring *suit* to recover preferential transfers which the creditors might have recovered if bankruptcy had not intervened.

Among them is Section 70-e, quoted at page 49 of appellant's brief, and under which he claims the right to enforce, in this summary proceeding, the surrender of the payments in question.

All of the decisions cited by appellant in his brief (pp. 49-63) in support of his right to enforce

a surrender in this proceeding under Section 70-e were in cases in which the trustee was *suving* to recover a preference, and are therefore not in point, the question here presented being directed, not to the rights which the trustee may have to recover preferences by a plenary suit or action, but solely to the trustee's right to enforce a surrender in bankruptcy as a condition to the allowance of a claim.

None of the cases cited by appellant in this connection (Appellant's Brief, pp. 49-63) go further than to sustain the trustee's right to recover "state-law preferences" under Section 70-e in a plenary suit or action, which for the purpose of this argument may be admitted.

Section 57 contains the provisions of the bankruptcy act providing for, and governing, the proof and allowance of claims. The method provided is a summary proceeding for that purpose in the bankruptcy court. Subdivision g of this section confers a right, not otherwise existing, whereby the trustee may reach preferences through this summary proceeding, not to the extent of recovering the preference, but merely to the extent of compelling its surrender as a condition to the allowance of the preferred creditor's claim. And that right, it will be noted from the wording of Section 57-g, does not extend to all preferences recoverable under the act, but is limited to those preferences expressly specified in Section 57-g, viz: *First*, "preferences voida-

ble under Section 60-b," and *second*, "transfers, etc., void or voidable under Section 67-e."

By specifying the particular preferences the surrender of which may be so compelled, the statute by its very terms excludes all other preferences from its operation; and, since Section 57-g is the only provision in the act empowering the court to require the surrender of preferences as a condition to the allowance of claims, it necessarily follows that the rights of the trustee in this proceeding are confined to, and governed by, Section 57-g and the two sections, 60-b and 67-c, therein mentioned.

This construction of the statute seems plain from the wording of the statute itself; and we find that it is the construction placed upon Section 57-g by the Supreme Court.

In *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49, N. E. 571, a case in which a claim in bankruptcy had been ordered expunged unless the creditor surrendered certain alleged preferential payments claimed by the trustee to be voidable under Section 60-b, Mr. Justice White, in deciding that the court below had erred in finding that the payments in question were voidable preferences under that section, and had therefore erred in requiring their surrender as a condition to the allowance of the claim, *held*, in effect, that Section 57-g as amended in 1903 is jurisdictional, "empowering the (bankruptcy) court to compel creditors to sur-

render preferences as a prerequisite to the proof of claims" against the estate of a bankrupt, and that it "relates only to those creditors" who have received preferences as specified therein.

The following quotations from the text writers amply support this very obvious construction:

After explaining that, prior to its amendment in 1903, Section 57-g, which originally read, "The claims of creditors who have received preferences shall not be allowed," etc., without specifying what preferences,—the words "voidable under Section 60, Subdivision c, or to whom transfers void or voidable under Section 67, Subdivision e, have been made or given," having been inserted by the amendment—was found to be unsatisfactory in its operation, the author of "Collier on Bankruptcy," in discussing the effect of the section in its present amended form, says:

"Congress has responded by amendment (1) making it certain that no transaction more than four months before bankruptcy is a preference and (2) *limiting that which must be surrendered as a condition precedent to proving a debt to* (a) preferences that are 'voidable under Section 60, Subdivision b,' and (b) advantages possessed by creditors 'to whom conveyances, transfers, assignments or encumbrances, void or voidable under Section 67, Subdivision e, have been made or given. . . . Considered broadly, Subsection g seems now to mean . . . He who has obtained an advantage over other creditors in any of the ways

indicated in the present law (i. e., Section 57-g) *and only such an one, must hereafter surrender his advantage before his claim can be filed or allowed.*"

"The effect of this change in Section 57-g is to make *only those preferences voidable* (necessary to be surrendered on objection to claim) which are made so by Section 60-b, or by Section 67-e, which latter refers only to conveyances made with intent to defraud creditors or rendered invalid by some statute (law) of the state."

Collier on Bankruptcy (1921 Ed.), pp. 803-804, paragraphs (2), (3), (4).

The author of the article on "Bankruptcy" in "Ruling Case Law" places the same construction upon this section as amended. He says:

"Surrender of Preferences: . . . If an alleged preference was not voidable under either of the sections mentioned in Section 57-g, its surrender cannot be required as a prerequisite to the proof of a claim." (Citing *Western Tie & Timber Co. v. Brown* (U. S. Sup.) (*supra*).

3 R. C. L. (Bankruptcy), p. 251, Sec. 80.

Upon careful examination, we have been unable to find any authority for placing a broader construction upon this provision of the act, Section 57-g, than stated in the authorities we have quoted, in the light of which there can be no doubt but that the rights of the trustee in this proceeding are confined to the provisions of Section 57-g and the Sections, 67-b and 67-e, therein mentioned.

This brings us directly to the consideration of appellant's second theory, that he is entitled to the surrender of the payments in question, in this proceeding, on the further ground that they constitute "state-law preferences."

(5) IS THE INSOLVENCY OF THE DEBTOR A NECESSARY ELEMENT OF PROOF, IN THIS PROCEEDING, IN ORDER TO REQUIRE THE SURRENDER OF A TRANSFER (i. e., PAYMENT) HELD NULL AND VOID AS AGAINST CREDITORS BY STATE LAW?

As we have shown—conclusively, we think—that a preference cannot be availed of by the trustee in this proceeding unless it is shown to be voidable under one or both of the sections, 60-b and 67-e, mentioned in Section 57-g; and as Section 67-e is the one relating specifically to "state-law preferences," it was necessary for the trustee, in order to prevail under his theory of a "state-law preference," to prove that the payments in question were made under such circumstances as to make them voidable preferences within the meaning of Section 67-e.

In order to do so, was it necessary for him to show that the debtor was "insolvent," in the bankruptcy sense, of an excess of liabilities over assets? In other words, is insolvency, in that sense, an essential element of the voidable preference as defined in Section 67-e?

The answer to this inquiry lies in the wording of Section 67-e, read in the light of Section 1 of the act (quoted *supra*, p. . .), providing that, "the words and phrases *in this act* shall, unless the same be inconsistent with the context, be construed as follows: (15) "A person shall be deemed 'insolvent' *within the provisions of this act* whenever the aggregate of his property," etc.

There being no inconsistency in the context of Section 67-e, with respect to the use therein of the word "insolvent" in that sense, it would seem to require no argument that insolvency in the bankruptcy sense is an essential element of a voidable preference as defined in Section 67-e.

The phrase, "and while insolvent," as used in Section 67-e, is in the nature of a condition or limitation, equally with its accompanying phrase "within four months prior to the filing of the petition." Both are obviously intended to place definite limits upon the voidability under the bankruptcy act of preferences prohibited by state laws. To give the word "insolvent" any other meaning in this connection than that prescribed in the act itself would not only violate the plain requirements of the act, but would make the limitation uncertain, and therefore valueless for the purpose intended by Congress, which obviously was to make it certain that no preference, whether a bankruptcy preference strictly speaking or a "state-law preference," need be sur-

rendered as a condition to the allowance of a claim which antedates the "four months' period" or is made while the debtor's assets exceed his liabilities.

Unless, then, the bankrupt is shown to have been insolvent in the bankruptcy sense at the dates of the several payments to Carson Pirie Scott & Company—and we think that, for the reasons we have pointed out in discussing the evidence in its bearing upon these payments treated as "bankruptcy preferences," that the evidence unquestionably establishes solvency in the bankruptcy sense—the trustee cannot prevail upon either of his theories in this proceeding, regardless of whether or not the payments constituted preferences as defined by state law.

While we feel convinced, therefore, that the court will find it unnecessary to go further in the consideration of the questions presented by this appeal, we will nevertheless discuss briefly the cases cited by the trustee in support of his contention that the payments in question were, in fact, preferences under the "Trust Fund Doctrine" of the Washington courts.

(6) WAS EACH OF THE PAYMENTS TO CARSON PIRIE SCOTT & COMPANY MADE UNDER SUCH CIRCUMSTANCES THAT IT PROPERLY COULD BE HELD NULL AND VOID AS AGAINST CREDITORS BY THE LAW OF THE STATE OF WASHINGTON, UNDER THE SO - CALLED "TRUST FUND" DOCTRINE OF THAT STATE?

While the Washington court in the decisions cited by appellant in support of an affirmative answer to this question (Appellant's Brief, pp. 56-67) has indulged in expressions to the effect that the test of the solvency of a corporation is "the ability to pay its debts in due course of business" and in some instances to the effect that a transfer which operates to prefer the creditor receiving it, is voidable, "no matter what the good faith of such creditor may be," it will be found upon an examination of them that in each instance the court has used those expressions in cases where the facts showed: with respect to insolvency, that the financial plight of the debtor corporation was much more serious and involved than mere inability to pay its debts as they matured; and, with respect to the creditor's knowledge of the debtor's financial condition, that almost invariably the creditor had actual or constructive knowledge of the fact of the debtor's insolvency, or of the fact that the transaction would work a preference.

So that, upon a careful examination of all the

cases cited by counsel in his brief, we think those expressions wherever they have been used by the state court, may fairly be regarded as *dicta*, rather than as definitely defined rules to be applied without qualification in all cases, regardless of the facts in the particular case.

In none of the cases cited, and in none of the Washington decisions applying the trust fund doctrine so far as we have been able to discover through careful search, has the court been called upon to apply that doctrine to a state of facts at all similar to the facts involved in the instant case.

In the case of *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, quoted at page 57 of appellant's brief, the debtor corporation gave a mortgage of all its property with the right in the mortgagor to continue in possession and operate the business. It was in this case that the Washington court first used the expression, "No matter what the good faith of its creditor is." But that expression was clearly *obiter*, since the court expressly found, in its opinion, that the creditor had knowledge both of insolvency and of the fact that the mortgage, from its very provisions, worked a preference. The question of the effect of lack of good faith was not involved in the decision.

Also in this case the court did not lay down the test of "inability to pay debts as they mature" as the

sole test of insolvency; but added other elements, including deficiency of assets to pay debts, saying:

“When it (the debtor corporation) has reached a point *where its debts are equal to or greater than* its property, *and* it cannot pay in the ordinary course, *and* its business is no longer profitable, it ought to be wound up and its assets distributed.”

It was in this case that the “trust fund doctrine” found its first expression in the Washington courts; and it appears from an examination of the decisions adopting and applying it, that the court in its subsequent decisions with practical uniformity quoted or referred to the expression, “no matter what the good faith of the creditor is,” as a correct statement of the law in that regard, without any adequate consideration or explanation of its application, or attempt to define its meaning as used, and almost invariably under a state of facts where, as in this case, the question of the lack of good faith on the part of the creditor was not actually involved in the decision.

In the case of *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, quoted at pages 57-59 of appellant’s brief, the decision was expressly based on facts showing collusion between the debtor corporation and the preferred creditor, in allowing the preferred creditors to obtain judgment ahead of other creditors, and also showing insolvency in the bankruptcy sense. In that case, as counsel for appellant concedes (Appellant’s Brief, p. 59) Judge Dunbar held that the proof

must show (1) that the corporation was insolvent, and that (2) the preferred creditor had reasonable cause to believe that the debtor was insolvent.

In *In re Tacoma Ledger Co. v. Western Home Bldg. Assn.*, 37 Wash. 467, 79 Pac. 992, cited at pages 59-60 of appellant's brief and in which counsel argues that the Washington court reversed its previous ruling in the case of *Conover v. Hull*, *supra*, as to the necessity of "reasonable cause to believe," and returned to the original doctrine of *Thompson v. Huron Lumber Co.*, which counsel says has since been held by that court, namely, that "reasonable cause to believe need not be proved and that the good faith of a creditor is immaterial:"

The court stated (Opinion, p. 470) that "the single question" involved was "the right of one corporation to dispose of its capital stock and assets to another corporation, transferring its business to the purchasing corporation, itself ceasing to do business, neither corporation making provision for the payment of the debts of the selling corporation."

The purchasing corporation was not a creditor of the selling corporation, and therefore the case is clearly not in point.

And in the paragraph of the opinion quoted by appellant (p. 60) to the effect that the purchasing corporation's ignorance of the existence of indebtedness owing by the other would not avail it, for "with

or without that knowledge" the property is still a trust fund, etc., the court was applying that principle specifically, as shown by the sentence in the opinion immediately following, to "Attempts of this kind to avoid the payment of debts by consolidation." (Opinion, p. 473), and not otherwise.

The expression, "The good faith of the creditor is immaterial," does not appear in this opinion, obviously because the very nature of the transaction as it was described by the court implied lack of good faith.

In *Jones v. Hoquiam Lbr. & Shingle Co.*, 98 Wash. 172, 167 Pac. 117, quoted at pp. 60-61 of appellant's brief, the preference consisted, not of money paid in the usual course, but of real estate, and accounts receivable, so that there the creditor must have had cause to believe that the debtor was insolvent, since its action in making such an unusual payment was, of itself, sufficient to charge the creditor with "reasonable cause to believe." In this decision, after distinctly holding (Opinion, p. 175) that at the time of the transfer the liabilities exceeded the assets two to one, the court went back to the original announcement of the Trust Fund Doctrine in *Thompson v. Huron Lumber Co.*, *supra*, quoting *verbatim* and with approval portions of the opinion in that case, including the expression, "no matter what the good faith of its creditor is," and also the test for the application of the Trust Fund Doctrine, as originally

announced in the Thompson case, embracing (as it did in that original case) not only the element of inability to pay in the ordinary course, but also the element of insolvency in the bankruptcy sense.

In *Benner v. Scandinavian-American Bank*, 73 Wash. 488, 131 Pac. 1149, quoted at page 62 of appellant's brief, the court will note from the portion of the opinion there quoted, that the debtor corporation was wholly insolvent in the bankruptcy sense, with liabilities five times the value of its assets, and that the preference was not a payment of money in full or on account, but was a transfer of property, a coasting vessel, to the value of about one-fourth of the total assets of the debtor corporation.

In *Williams v. Davidson*, 104 Wash. 315, 176 Pac. 334, quoted at page 63 of appellant's brief, while counsel's statement is true to the extent that the court held that there was no proof of "reasonable cause to believe," on the part of the creditor, that she was receiving a preference, on the other hand the court expressly found (Opinion, p. 321) that the preferred creditor "had ample notice of the insolvency of the corporation," for she had been given possession of its books and assets, showing insolvency in the bankruptcy sense, after she herself had threatened a receivership and had represented that the corporation was practically bankrupt. The creditor did not have reasonable cause to believe that she was being preferred in taking over the entire assets, be-

cause she required a certificate under the Bulk Sales Law of the state, which disclosed no outstanding creditors, but from which there had been omitted, by mistake, the names of certain creditors who afterward invoked the Trust Fund Doctrine. In this case the court again uses the expression, quoted from *Jones v. Hoquiam Lumber & S. Co.*, and in turn from *Thompson v. Huron Lumber Co.*, *supra*, "No matter what the good faith of such creditor may be," but at the same time the opinion emphasized the fact that the creditor held to be preferred—and apparently very unjustly so, in view of the strong dissenting opinion by Judge Chadwick—did have knowledge of the debtor's insolvency. The majority opinion went upon the theory that where one of two innocent parties must suffer, the one least at fault must bear the burden.

In view of its application — or more accurately speaking, its entire lack of application, in most instances—to the facts in these cases, it seems impossible to determine, we think the court will conclude, just what the state court meant by the expression "No matter what the good faith of the creditor is."

It appears, however, that the Washington court has not applied the Trust Fund Doctrine as rigidly and unqualifiedly as the expressions used by the court in the cases cited by appellant, at first impression, would seem to imply; but that the court has expressly recognized an exception to the rule con-

tended for by appellant, within which exception we think the instant case clearly falls, namely, that where the debtor corporation, *though insolvent, is still a "going concern"* at the time of the preference, the creditor will be allowed to retain the same provided he received it in good faith.

This EXCEPTION to the general rule was announced in the case of *Brooks v. Skookum Mfg. Co.*, 9 Wash. 80, 37 Pac. 284, a case in which a chattel mortgage covering the debtor company's stock, fixtures and buildings was given to secure a past due indebtedness at a time when the debtor corporation had other past due indebtedness which it was unable to meet. The mortgage was accepted by the preferred creditor in good faith and on the understanding that the extension of indebtedness secured thereby would enable the debtor to obtain other extensions. Subsequently, the corporation ceased to do business because of the sudden departure of its president, Mr. Hall.

The court in its opinion, after stating that it was contended by the respondent that the action fell within the rule laid down in *Thompson v. Huron*, 4 Wash. 600, *supra*, said:

"But it seems to us that a substantially different case is presented. . . . The corporation had conducted its business regularly and continuously up to the time Hall left. . . . The fact that it owed more than the value of its property, not including its good will, would not

necessarily prevent its continuing business. . . . The fact that the business had been a losing one, standing alone, clearly would not have been sufficient to avoid the mortgage. . . . We think the plaintiff was justified in assuming that it was able and intended to continue in business," and *held* that

"What was said in that case (*Thompson v. Huron*, 4 Wash. 600) was confined to corporations having practically stopped business, or reached a point where the corporate business could no longer have been successfully operated."

Brooks v. Skookum Mfg. Co., 9 Wash. 80, 37 Pac. 284.

This qualification by the Washington court of its Trust Fund Doctrine, confining the application of the same to corporations that have practically ceased to be "going concerns," following closely upon the original adoption of the Trust Fund Doctrine in the leading case of *Thompson v. Huron*, has not since been modified, or receded from, in any decision of the court so far as we have been able to discover.

Another case recognizing the "going concern" exception is *Strohl v. Seattle National Bank*, 25 Wash. 28, 64 Pac. 916, involving a chattel mortgage covering the bulk of the corporate assets given to secure an antecedent date at a time when the debtor corporation was clearly solvent in the bankruptcy sense, but was insolvent in the sense of inability to meet its debts as they matured. It, however, was a "going concern."

In its opinion, the court said:

"The evidence in this case shows that when the mortgage was executed, the corporation was a 'going concern.' . . . Its business continued for months afterwards and other creditors continued to extend credit. . . . Appellant's counsel contends that this case falls within the same rule as the following cases: (*Thompson v. Huron* and others.) *We think not.* In the case of *Thompson v. Huron Lbr. Co.*, *supra*, the court uses this language: 'When it has reached a point where its debts are equal to or greater than its property, and it cannot pay in the ordinary course, and its business is not longer profitable, it ought to be wound up and its assets distributed.' Such conditions are not shown to have existed in this case when the mortgage was given."

Held, not a recoverable preference.

Strohl v. Seattle Nat. Bank, 25 Wash. 28, 64 Pac. 916.

(See also *Hadley v. Bank of Ellensburg*, 67 Wash. 680, 123 Pac. 321.)

We find that Washington is included by the author of the article on corporations in Cyc. as among the states recognizing this exception to the Trust Fund Doctrine. The exception is there stated as follows:

"Sec. 3076. *An exception to the rule denying the right to prefer creditors is recognized in some jurisdictions in cases where the corporation, although insolvent, is a 'going concern,' at the time of the preference, doing business in the ordinary way; and under such circumstances, preferences to particular creditors are sustained if made in good faith.* (Citing cases in footnote 72 from

various states, including Washington: *Brooks v. Skookum Mfg. Co.*, 9 Wash. 80, 37 Pac. 284); 14 Cyc. 999 (Corporations—Trust Fund Doctrine—Exception to Rule).

Counsel for appellant in his brief, in commenting upon the cases of *Jones v. Hoquiam Lbr. Co.*, 98 Wash. 172, 167 Pac. 117 (brief, p. 60) and *Benner v. Scandinavian-American Bank*, 73 Wash. 488, 131 Pac. 1149 (brief, p. 62), points out that in these two cases the debtor corporation continued to be a "going concern" after the giving of the preference; but it will be noted that in neither of these cases was the question of the applicability of the above exception presented, or considered by the court. They do not overrule *Brooks v. Skookum Mfg. Co.*, *supra*, in this respect.

The case of *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566, 35 Pac. 396, is another case in which the Washington court declined to apply the Trust Fund Doctrine (distinguishing *Thompson v. Huron*, *supra*), although it found that the debtor corporation was in financial difficulty at the time of the preference and insolvent in the sense of being unable to pay its debts as they matured. In this case the debtor corporation gave a mortgage covering its entire property to secure certain past due indebtedness and certain advances made at the time, the purpose being to enable the debtor to continue its business. It was being pressed at the time and also it was doubtful whether

its assets equaled its liabilities. The court, in its opinion, said:

"It is contended . . . that the case falls within the decision of this court in *Thompson v. Huron*, 4 Wash. 600, as appellant insists that the mill company was insolvent at the time this mortgage was executed.

"It is not clearly apparent that the corporation was insolvent at said time. It had been operating its mill up to a few days before the execution of the mortgage. It was then being pressed by its creditors and was unable to pay them at that time and it is doubtful whether the general market value of its property equaled the amount of its indebtedness; but its evident desire was to continue its business and to get the matters of its corporation in better shape. . . . And it fairly appears from the record that the mortgage was executed in good faith for that purpose. . . . We are of the opinion that this case does not fall within the rule laid down in *Thompson v. Huron Lbr. Co.*, under the facts above stated."

Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

In most of the cases in which preferences have been declared recoverable under the Trust Fund Doctrine, it appeared that the debtor corporation had ceased to be a "going concern" at the time of the preference, and that fact was emphasized in the decision. See:

Leslie v. Wilshire, 6 Wash. 282, 33 Pac. 505.

Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854.

Biddle Pur. Co. v. Port Townsend Steel Co., 16 Wash. 681, 48 Pac. 407.

Cook v. Moody, 18 Wash. 114, 50 Pac. 1020.

It will be recollected in this connection that, as testified by Mr. LeSourd, "this business was a going business up until it was turned over to the state court receivers" (R. 44), about two weeks after the last payment to Carson Pirie Scott & Company. The same witness testified: "So far as the Elliott and O'Brien interests are concerned, it was the expectation up to say the 2nd of May, 1921, when Hart came from Seattle and interviewed me, that the business would be continued." (R. 44.)

Reduced to its simplest terms, appellant's contention that the payments in question to Carson Pirie Scott & Company were recoverable preferences, is based upon the theory that mere proof that the indebtedness upon which the said payments were made was past due and that the creditor to whom the indebtedness was owing knew that it was past due, is sufficient to constitute a voidable preference under the Trust Fund Doctrine of the state, assuming that the payments resulted in a preference. (Appellant's Brif, p. 67.)

The Washington decisions cited by appellant clearly do not support this contention; and, in the light of the decisions to which we have directed the court's attention as well as those cited by appellant, the trustee has failed—unquestionably, we think—to establish that the payments to Carson Pirie Scott & Company were made under circumstances such that the Washington court would hold them null and

void as against creditors under the State Trust Fund Doctrine.

This appellee, Carson Pirie Scott & Company, therefore respectfully submits that the decree appealed from in this matter should be affirmed as to it.

Respectfully submitted,

WALTER A. McCLURE,

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Attorneys for Carson Pirie Scott & Company, one
of the Appellees.

**United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

In the Matter of
ELLIOTT-O'BRIEN COMPANY, a Corporation,
Bankrupt.

S. G. CLIMENSON, as Trustee of ELLIOTT-
O'BRIEN COMPANY, a Corporation,
Bankrupt.

Appellant

vs.

CARSON, PIRIE, SCOTT & COMPANY, a
Corporation; COFFMAN. DO B S O N
Bank & TRUST COMPANY, a Corpora-
tion; BEE NUGGETT PUBLISHING
COMPANY, a Corporation.

Appellees.

BRIEF OF APPELLEE
COFFMAN-DOBSON BANK & TRUST CO.

A. A. HULL and J. E. MURRAY,
Attorneys for Appellee

Coffman-Dobson Bank Building,
Chehalis, Washington.

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**Coffman-Dobson Bank Building,
Chehalis, Washington.**

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BRIEF OF APPELLEE
COFFMAN-DOBSON BANK & TRUST CO.
STATEMENT OF THE CASE

Following the rules of this court we do not set forth
a statement of the case, as that of the appellant is
substantially correct. (Apps. Brief pps. 3-7 inc.)

ARGUMENT

The appellant presents to this court for its consideration two questions, namely;

1st. Does the evidence show that appellants had “reasonable cause to believe” that the bankrupt was insolvent at the time the payments were made effecting a preference as required by the Bankruptcy Act?

2nd. Are preferences void under the law of the state of Washington regardless of whether or not creditors have “reasonable cause to believe” that the debtor is insolvent?

We take it under the rule announced in

Stellwagon v. Clum, 245 U. S. 605 41 A. B. R., 1

and generally recognized, that an appellate court will not disturb the conclusions of the Referee on questions of fact where there is no conflict in the testimony, is applicable to the question involved as to whether or not this appellee had reasonable cause to believe that payments made to it by the bankrupt might effect a preference. The referee found that this appellee, which will be hereinafter referred to as the bank, did not have such “reasonable cause to believe” and that a preference was therefore not effected within the meaning of the Bankruptcy

Act, and the referee applied the same reasoning to the application of the so-called trust fund theory under the state law. Hence it is clear that on a conflict in the testimony conclusions of the Referee which were readily affirmed by the District Court will be adopted by this court on the question of the bank having a reasonable cause to believe a preference was being or might be effected by the receipt of payments from the bankrupt.

On page 15 of appellant's brief the appellant attempts to argue that the bank and the other appellee not only had reasonable cause to believe that the debtor was insolvent, but that they actually knew it. This bald statement is decidedly not borne out by the record, and at the expense of being guilty of some repetition, we desire to submit here a resume of the outstanding points shown by the testimony in this case, which is as follows:

RESUME' OF THE EVIDENCE

For a long time prior to bankruptcy the bank had advanced money in the usual course of business to the bankrupt on its notes. These notes on January 1, 1921, were changed from demand or one day notes to notes maturing three months hence; that is to say on April 1, 1921, and these notes aggregated \$5500.00

(R.108-112), After January 1, 1921, the bank made further advances, which were later repaid. (R. 77). Evidently the bank changed the demand or one day notes to three month notes with the idea that the proposed reduction of assets of the appellant by way of sales and general liquidation called for a definite final payment of the obligation which had been carried for years(R.113) and on April 1 a regular notice of the maturity of the notes was sent out to the bankrupt, and Mr. Elliott came in and it was then agreed that he would pay the notes at the rate of \$1,000.00 per week and no extension was asked for. (R. 113). All merchants were rapidly reducing inventories during the early part of 1921 (R. 43) and naturally the bank wanted its debt reduced as the inventory shrank. The reductions of inventories were very rapid (R. 43) and, therefore, the bank might reasonably expect its debt to be rapidly reduced. When Elliott came in as aforesaid, he was informed that the bankrupt was paying other concerns and taking discounts and that the bank expected the same treatment on its obligations, which had then matured. (R. 64) The proposition to pay \$1000.00 per week looked easy and was lenient. (R. 65-75-76). The bank did not take a determined stand on this matter.(R.79)

December 31, 1920 the bankrupt gave the bank a statement showing the condition of its business on

that date. (R. 107-115). This statement showed a net worth of \$14,230.35 after charging off depreciation and bad accounts. Thereafter from time to time the bank discussed with Elliott, the manager of the bankrupt, the condition of the business and no material changed was disclosed, a margin of surplus over debts always appearing. (R. 107)

The bank knew of no financial difficulty of the bankrupt until May 3rd, 1921, when some checks bearing the bankrupt's endorsement came from another bank, (the bankrupt having always done business theretofore with the appellee bank) and this put them on inquiry. They went to their attorney, who investigated and found that the bankrupt was negotiating through the Seattle Merchants' Association for some solution of its problem. (R. 107). It had desired to sell out, but it then had no officers capable of effecting a transfer and a receivership was suggested in order to effect this. (R. 100) Upon learning of the probable embarrassment of the bankrupt the bank charged the balance in its deposit against the notes and this is the credit of \$143.08 on May 4, 1921. (R. 99-111) Up to this time the bankrupt had been carrying a balance in their account with the bank in practically the same amount as it had for years (R. 108-110) and when it suddenly

ceased doing business with the bank it put the bank on inquiry. (R. 110)

It is well to note that up to May 2nd, Mr. LeSourd, who represented the majority of the capital stock of the bankrupt, did not know that the bankrupt was insolvent. (R. 41) Elliott, the manager up to April 26th, when he left did not consider the business insolvent. ((R. 69-104-105) nor did Hart, his successor think anything but that the business would at least pay its debts, even if the stockholders got nothing. (R. 91-92-93) As late as April 14th Hart thought the capital stock had value and talked of buying it. (R. 92)

It should be borne in mind that the bank was liquidating obligations due it, as all banks were at that time, (R. 113) and that that time meant a period which is aptly described by the Honorable District Judge in his Memorandum Decision to the effect that, "During a period of drastic deflation, following a period of extraordinary inflation, when the judgment and calculation of business men are liable to be unsettled and to want in fullness of vision and a complete grasp of the relative worth of the various items entering into the value of a going merchandise business the knowledge and notice of insolvency should be shown with much greater clearness than it could be

contended was done in the present case.” (R. 28)

If a new line of credit was necessary after the company had paid up its obligations to the bank it manifestly would be on the basis of the company's standing and needs at the time it was asked for. (R. 113-114) An examination of the bank's ledger for April, 1921, shows daily balances of substantial amounts and large daily deposits, with only one overdraft, and the balances gradually increasing in size toward the end of the month. (R. 110-111-112) The vice of appellant's argument lies in its failure to account for a disposition of the large surplus in the business through sales and otherwise and the acceptance of such surplus or a portion thereof by a creditor, as under such circumstances a creditor would not be held to notice of any condition of insolvency. The notice the bank had was to the contrary namely: of the bankrupts' solvency, a fact quite evident from the forced sale of the assets for \$11,000.00 (R. 21) which sale the purchaser considered a good one for him (R. 84)

About February 18, 1921, one stockholder wanted to sell her stock for 50 cents on the dollar, (R. 117) indicating that she thought the business could pay its debts and leave at least 50 per cent for stockholders on their investment. The cause of the sales

and general liquidation was not the insolvency of the business but the decision of the majority of stockholders to close out. (R. 117-119--120-123-125--126) Mr. LeSourd, representing the majority of the stock employed D. G. Abel, an attorney, to adjust demands of the O'Briens against Elliott. (R. 130 to 134)

It is interesting to note that on April 23, 1921, Mr. LeSourd did not know whether the assets exceeded the liabilities. (R. 149-150) As indicating that the bank had no worry about the Elliott-O'Brien Company, when Mr. LeSourd talked to the vice president of the bank he found a man who knew very little of the bankrupt's affairs. (R. 36) Certainly if the bank was afraid of the bankrupt's condition, its officers would have had knowledge of the matter.

Again referring to Mr. LeSourd, it seems that he would not sell the business at 90 cents on the dollar, which amount would have paid the debts and left something for stockholders. (R. 39-75) He thought the capital stock had a value as late as April 22nd and he offered the stock at 50 cents on the dollar on December 31, 1920. (R. 40) Indeed it was not until May 2nd that Mr. LeSourd and Mr. Hart or anyone else knew that the store was insolvent. (R. 41-43) How could the bank have known it sooner?

It should be borne in mind that no creditor was threatening to enforce collection of any debt (R. 44) and up to May 2nd the owners of the business expected it to continue. (R. 44) The reductions by sales etc. were occasioned by a desire of the O'Briens to reduce their capital stock holdings to cash. (R. 44) Mr. Elliott wanted to buy the business and pay 50 per cent for the capital stock. (R. 46) Manifestly Elliott did not think the company was insolvent.

The source of the bank's knowledge was from Elliott, who had been manager of the store for several years and in sole charge, and he left when the O'Briens obtained control of all the stock and decided to sell regardless of Elliott's desires. (R. 50)

Some stress was laid by the appellant on so-called overdrafts of the bankrupt in its account at the bank but these overdrafts did not appear on the bank's books and the bank knew nothing of them (R.53) and as late as November 1920, the bankrupt discounted most of the bills. (R. 58) Up to January 1, 1921, no debt was past due except the account of Carson, Pirie Scott. (R. 71) The same condition prevailed in January and February; (R 71) In March two more accounts became past due, (R. 72) one of which was the Western Dry Goods account, whose representative investigated and became satisfied with the

condition of the bankrupt early in April. (R. 72-73)

The stock of merchandise was in perfect condition April 1, 1921. (R. 76-83) and Elliott was of the opinion that the stock of merchandise should bring 100 cents on the dollar. (R. 75)

Elliott did not tell the bank of his intention to leave until April 20th, according to his testimony; (R 78-79) and then Hart told the bank that the business would continue as it had, (R. 87-91-93) but that they would have to slash prices to the extent that they probably would be able to pay the debts and not leave anything for the stockholders. (R. 87-91-92) and up to the time of the appointment of the reciver in the State Court Hart was of the same opinion. (R. 92) Touching the question of notice to the bank, the appellant makes reference to statements made between LeSourd and Hart by correspondence and otherwise, but these were not brought to the attention of the bank and it did not know of them, and in any event the testimony of these parties when in court under oath disclosed that their main idea was not whether the concern would pay out, but whether it could do so quickly, their interest then being to realize on the capital stock investment of the O'Briens.

It is interesting to note also just what preference

it is claimed the bank and Carson, Pirie Scott Company obtained. Carson, Pirie Scott Company and the bank were easily the largest creditors and it is but a natural thing that they should have obtained most of the money. By a simple computation, taking the figures on the Trustee's Exhibit "I" (R. 157) it is apparent that the assets having been disposed of at \$11,000.00 would pay about 73 per cent dividends on the claims filed, whereas if the alleged preferences are returned to the estate, the claims of the two appellees will be proportionately increased so that the dividends then paid will not much exceed 88%, an alleged preference in round numbers of approximately 15%, and a preference which is not one which indicates that either of the appellees was trying to get substantially more than other creditors and not indicative of any attempt on their part to gut the bankrupt concern. The amount received by the two appellees appears large only when you do not consider that their claims were large.

ARGUMENT CONTINUED

From the foregoing resume of the testimony it is clear that the bank had no knowledge of any embarrassment of the bankrupt concern at any time until May 2nd or May 3rd, and indeed it is questionable

whether the company was insolvent at all, or in any event insolvent prior to the 1st of May. And it is clear too that the bank was merely liquidating outstanding obligations, and especially with a concern which was rapidly reducing its stock of merchandise with the intention of paying its debts.

Hence we argue that the cases cited by the appellant touching the matter of "reasonable cause to believe" are in point only when facts exist from which reasonable cause to believe can be inferred, and where the testimony is conflicting and the Referee has found that reasonable cause did not exist, no appellate court should disturb such findings of the Referee.

However, if the Referee had made no findings on the question, we apprehend that this court could reach no other conclusion than that the bank was acting in the utmost good faith in the ordinary course of business and that it was taking payment of notes past due in the customary way, with no circumstance to put it on inquiry.

In the case of

Healey v. Wehrung, 229 Fed., 686, 36 A.
B. R. 673

decided in this court, the court was dealing with a state of facts so entirely different from those in the case at bar, that it is hardly in point in this case.

With the general proposition found in so many case, that if insolvency is known to exist or if the creditor has reasonable cause to believe that it did exist he will be presumed to have reasonable cause to believe that a transfer to him would effect a preference we have no quarrel, but merely say that the facts brought out in this case did not bring it within the rule of the cases referred to.

In this connection it should be borne in mind that under the Bankruptcy Act insolvency is not inability to pay debts, but it is where "The aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

Bankruptcy Act, Sec. 1

Therefore, the appellant should prove that the bank had knowledge or reasonable cause to believe that the bankrupt was insolvent under the Bankruptcy Act

in order to effect an avoidance of the payments complained of, and certainly the evidence falls considerably short of proving any such knowledge or reasonable cause to believe. As to the question of whether the bank had notice of insolvency under the state law, we will touch later on.

Another question arises and that is whether it appears satisfactorily from the testimony that the bankrupt was insolvent under the Bankruptcy Act, or under the State Law at any particular time prior to May 2nd. It is not clear to us from the testimony that bankruptcy existed at any time prior to May 2nd. if indeed it existed at that time. The assets seem to have exceeded the liabilities and brought a very substantial amount at a forced sale, and that all the parties expected that the debts could be paid by reducing the assets to cash, the thing that was prevented by receivership in the State Court, hastened by the actions of representatives of the majority of the capital stock in insisting that the assets be reduced to cash not for the purpose of ultimately paying the debts, but of realizing on the stock investment.

RIGHT OF SET-OFF BY BANK

The right of a bank to set-off against matured ob-

ligations, due it from a customer, the customer's deposit in the bank's hands, cannot be seriously questioned.

2 *Collier on Bankruptcy* (12 Ed.) 1095
et seq. Dunlop v. Seattle Nat'l Bank, 93
 Wash., 568. 161 Pac., 364. 38 Am. B. R. 937

Nor was this right questioned in this proceeding in so far as the application by the bank of the \$143.08 balance on May 1, 1921 was concerned.

The record shows balances in various amounts during April 1921, which was the month in which the bank received the payments complained of. (R. 110-111) The bank could have at any day or on several days during the month of April applied the balances in its hands on the bankrupt's notes to it. Had the bank done so it would have been paid in full. By taking checks from the bankrupt periodically during April, thereby effecting the payments complained of by the appellant, the bank got no more than it could have obtained had it set-off directly from the depositor's account, amounts equivalent to the amounts for which it received checks.

The method of set-off is not material, whether it

be by check or by direct application of the depositor's balance.

Studley v. Boylston Nat'l Bank, 29 Am.
B. R. 649. 200 Fed., 249.

Wilson v. Citizens Trust Co., 37 Am.
B. R. 86, 233 Fed., 697.

True the bank's right to set-off might be affected by collusion between it and the bankrupt, as, for instance, in building up a balance for the purpose of set-off.

2 *Collier on Bankruptcy* (12 Ed.) 1095
n. 37. *In re Scherzer*, 130 Fed. 631. 12 Am.
B. R. 451.

But in this case it is clear that no such collusion existed. If collusion had existed the bank would not appear in this proceeding as a claimant,—it would have been paid in full and gone the way of those creditors referred to by the trustee in his testimony. (R. 104.

It seems that the bank's right of set-off is a more ancient rule of law than any "trust fund theory."

2 *Collier on Bankruptcy*, (12Ed.) 1095

and does not seem to be in conflict with the so-called "trust fund theory."

We urge that a bank loans money frequently on condition that the borrower carry his deposit account with the loaning bank, and such a deposit with the legal right of set-off becomes in part the security of the bank for the loan. The law does not require a corporation to change its depository when it suspects that it does or may face insolvency and the bank may apply the security given to it, namely, the deposit account, to the payment of obligations due it without violating any rule of law prohibiting preferences. If a bank may do this once it may do it twice or any number of times, or it may for convenience take the check to itself instead of directly applying the balance; thereby it will accomplish the same result. Therefore, it seems that in a very real sense a bank is a secured creditor (the measure of its security being the deposit at any one or various times) and the applying of the security it holds to the payment of debts due it is not a preference, for it gives full value for the amount taken, namely a credit for the full amount applied.

14 *a C. J.* 899

Klosterman v. Mason Co. Central R. R.

8 Wash., 281, 36 Pac., 136.

The right of a bank to set-off is often referred to as a lien. While this definition may be incorrect

7C. J. 765

in principle it is correct for the practical effect is the same.

3 R. C. L., 217

TRUST FUND THEORY

The "trust fund theory" is in substance this:

"The assets of an insolvent corporation constitute a trust fund for the payment of its debts in which all of its creditors are entitled to share ratably."

Nelson v. Svea Pub. Co., 178 Fed. 136

The Supreme Court of the State of Washington has announced its adherence to the "trust fund theory" and has applied it in the following cases, namely:

Thompson v. Huron Lbr. Co., 4 Wash., 600
30 Pac., 741., 31 Pac. 25.,

Conover v. Hull, 10 Wash., 673, 39 Pac., 166
45 Am. St. R. 810

Tacoma Ledger Co. v. Western Home Bldg., Assn., 37 Wash., 467, 79 Pac. 992.

Jones v. Hoquiam Lbr. & Shgl. Co., 98 Wash. 172, 167 Pac., 117

Benner v. Scandinavian Bank, 73 Wash., 488, 131 Pac. 1149, Ann. Cas., 1914 D, 702

Williams v. Davidson, 104 Wash., 315, 176 Pac., 334

In all of the cases decided by the Supreme Court of the State of Washington, wherein the "trust fund theory" is applied it is clear from the record in those cases that the preferred creditor had knowledge or should have had knowledge of the insolvent condition of the bankrupt at the time of receiving the preferences.

In many states which adhere to the so-called trust fund theory" an exception is recognized in the right of a corporation to prefer creditors though insolvent where the corporation is a "going concern" at the time of the preference, doing business in the ordinary way, if such preferences are made in good faith.

"An exception to the rule denying the right to prefer creditors is recognized in some jurisdiction's in cases where the corporation although insolvent, is a "going concern" at

the time of the preference, doing business in the ordinary way, and under such circumstances preferences to particular creditors are sustained, if made in good faith."

Sec. 3076, 14 a. C. J., 899

The exception above noted does not do violence to the "trust fund theory", but on the contrary gives it a reasonable interpretation and is not inconsistent with the decisions of the Supreme Court of the state of Washington wherein the "trust fund theory" is announced or applied.

In the case of *Thompson v. Huron Lbr. Co.*, 4 Wash., 600, the facts are clearly those which indicate that the preferred creditor possessed a knowledge of the insolvent condition of the corporation and hence could not have been acting in good faith. The case of *Thompson cv. Huron Lbr. Co.*, just cited, was limited in its application in the case of *Brooks v. Skookum Lbr. Co.*, 9 Wash., 80, where the court said:

"There was no attempt in the case of Thompson v. Huron Lbr. Co. to lay down the rule that a corporation conducting a profitable business will be adjudged insolvent simply because at some particular time its assets did not equal the amount of its liabilities. What was said in that case was confined to corporations having practically stopped business or reached the point where

the corporate business could no longer be successfully prosecuted." (Italics ours)

See also 14 *a. C. J.* 899, *Sec.* 3076.

The case of *Brooks v. Skookum Lbr. Co.*, aforesaid 9 Wash., 80 has never been overruled or distinguished by the Supreme Court of the state of Washington and its authority is unquestioned. Its application to the case at bar is clear.

For an excellent discussion of the "trust fund theory" and of what constitutes insolvency, see *Harle-Has Drug Co., v. Rogers Drug Co.*, 113 Pac. 791 (Wyo.)

Appellant cites the case of *In Re McDonald Sons*, 178 Fed., 487 (B. 47) This case is one based on facts essentially different from those in this case and insolvency clearly appeared.

The case of *Stellwagen v. Clum*, 245 U. S., 605, 41 *Am. B. R.* 1.

is based on positive statute law of the state of Ohio, giving a receiver or trustee title to property transferred in violation of that law, and even under such conditions insolvency must appear.

The case of *Grandison v. Robertson*, 231 *Fed.* 785.

cited by appellant is likewise a case dealing with statutory law of New York, giving a trustee a right of action, but even under such a case insolvency and the giving of the preference with the intent to create one are required. Likewise *Cordozo v. Brooklyn Trust Co.*, 228Fd., 333, cited by appellant, deals with the New York statute and all of the New York cases cited by appellant which we have examined are based upon this statute. There is no such statute in the state of Washington.

INSOLVENCY

Insolvency has been variously defined, usually with reference to the particular matter under consideration when the definition was made. It has been said that insolvency is inability to pay debts, but we believe the real test of insolvency is general inability to pay its debts in the due course of business and not mere inability to pay one or a few of its debts, for if the latter were true practically every corporation would be insolvent during most of its career, but general inability to pay its debts, means an inability to pay practically all of its debts, which discloses a hopeless situation. It is idle to say that a corporation that cannot pay one of its debts at the time it comes due is immediately insolvent and that any

creditor receiving any money from it is receiving a preference. Business in this country would cease to function if this were the case, or it would have to be done on a cash basis.

We do not think that any definition cited by the appellant goes to the extent of holding that the mere inability to pay a debt or a few debts in due course of business as they mature is the final test of insolvency. Such might be insolvency if other conditions were present such as the cessation of business.

The testimony in this case is that the concern had been discounting its bills as late as November and as late as in March only three accounts were past due. The business was a going concern, was doing its regular banking business as it had for years and was paying many of its debts and intended to remain open.

On pages 67 and 68 of appellant's brief appears the following:

“Applying the test of insolvency to the bank it likewise knew from its own account as well as from the condition of the bankrupt's business that it could not pay its bills in due course of business and therefore knew that the bankrupt was insolvent.”

The record will not bear out this statement, as

knowledge gleaned from the bank account showed that its condition was the same as it had been for years and it was evident to the bank that other creditors were being paid, and taken with all the other testimony hereinbefore referred to, it is clear that the bank had no suspicion of the insolvency of the bankrupt, if indeed, as we have before stated, it was insolvent at all.

Regina Music Box Co., v. Otto N Sons, 56
Atl., 715 (N. J.)

See pages 718 et seq., which contains a clear discussion of the elements of insolvency and what constitutes proof thereof.

See also

Shaw v. Gilbert, 86 N. W., 188-191 (Wis.)
which says “*Embarrassment accompanied by extension and other expedients is not unusual with manufacturing concerns having abundant assets.*”

REQUISITES OF PROOF

We contend that it was necessary for the Trustee to prove in order to set aside the alleged preference

that on the date of the receipt of each payment, by the bank—

1st. That the bankrupt was insolvent.

2nd. That each payment at the time it was received operated to give the bank a greater percentage than other creditors then received.

3rd. Did the bank at the time of receiving each payment know or have reasonable cause to believe that it was receiving a preference?

It does not appear from the record that the trustee has established these facts. It is conceivable that a particular payment would be preferential, whereas another would not be, and we submit that the Trustee has not sustained the burden placed upon him by the law.

See appellee Carson, Pirie Scott Co.'s brief on this subject.

THE TRUSTEE'S REMEDY

We take it that under the *Bankruptcy Act*, Sections 57-g, 60-b and 67-e, the remedy of the Trustee in the case of alleged preferences would be either to bring

a suit for the recovery of the alleged preference or as was done in this case, object to the allowance of the bank's claim until it had repaid the preference, or until the other creditors had received the same proportion that the bank had. Having chosen the latter course the trustee is limited to the establishment, if he can, of a preference under the *Bankruptcy Act*, provided in *Section 57-g* of that *Act*.

Western Tie & Timber Co., v. Brown 196 U. S. 502.

We contend that the trustee is therefore unable to apply the contention that there has been a preference under the so-called "trust fund theory" in a proceeding for the disallowance of the claim of the bank and is limited to the application of the law prohibiting preference within the four months period under the *Bankruptcy Act*.

Appellee Carson, Pirie & Scott Company's
brief herein.

CONCLUSION

This case has been carefully considered by the Referee and by the District Judge, both of whom

have arrived at the same conclusion after due deliberation, and we think their conclusion is not only equitable, but legally sound. We believe that the facts in the case and the law applicable thereto entitle the bank to retain the moneys paid to it as having been received in the utmost good faith in the ordinary course of business and without any knowledge or reasonable cause to believe on the part of the bank that the Elliott-O'Brien Co. was insolvent or even in danger of insolvency, and that the payments were received under the belief that the Elliott-O'Brien Co. was going to continue in business and would be able to pay all of its debts, and that neither the "trust fund theory" has been violated by receiving such payments, nor has the bankruptcy law applicable to preferences been violated.

We, therefore, conclude in saying that the order of the Referee and of the District Judge are entitled to the affirmance of this court.

At the hearing before the Referee and likewise on review before the District Judge in order to save a duplication arguments and briefs, etc., it was agreed that the arguments and briefs submitted by Carson, Pirie Scott Co., and by the bank would be applicable to the cases of the other in so far as per-

tinient and we, therefore,ask that in so far as applicable, the brief and argument of Carson, Pirie Scott Co. on this appeal be considered in connection with the brief on behalf of the bank.

Respectfully submitted,

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Chehalis, Washington.

**United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

In the Matter of
ELLIOTT-O'BRIEN COMPANY, a Corporation,
Bankrupt;

S. G. CLIMENSON, as Trustee of ELLIOTT-
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rupt, *Appellant,*
vs.

CARSON, PIRIE, SCOTT & COMPANY, a Cor-
poration; COFFMAN, DOBSON BANK &
TRUST COMPANY, a Corporation; BEE
NUGGET PUBLISHING COMPANY, a cor-
poration,
Appellees.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

NELSON R. ANDERSON,

Attorney for Appellant.

INSOLVENCY UNDER BANKRUPTCY ACT.

Counsel for the Bank does not question the Referee's finding that the bankrupt was insolvent in the bankruptcy sense, namely, that its liabilities were in excess of assets from December, 1920, to adjudication in May, 1921.

Counsel for Carson, Pirie, Scott & Co. questions the correctness of the Referee's finding on the question of insolvency in the bankruptcy sense; especially questioning the finding that "in December, 1920, the bankrupt owed for merchandise about \$16,240.92, and owed the Bank \$5500.00, making a total known indebtedness of \$21,740.92."

The Referee's findings are based on the record showing the total indebtedness for merchandise past due and not due on December 31, 1920, was \$16,240.92 (R-69) and that the indebtedness to the Bank on December 31, 1920, was \$5500.00 (R-52).

The next criticism of Counsel is that the Referee found the assets to be \$26,371.39, including fixtures of \$3520.00.

Counsel refers to a financial statement issued by the bankrupt on December 31, 1920, which showed the following assets:

Inventory	\$27,862.25
Book accounts	1,894.07
Fixture accounts	3,520.22, etc.

If there was no other evidence on the subject counsel might argue that the assets did exceed the amount fixed by the Referee, but the record shows that the merchandise was inventories on a cost basis on December 31, 1920, and that there was deducted \$2500.00 or \$2700.00 which the bankrupt claimed brought it down to market value (R-67). In view of the testimony showing that the value of merchandise rapidly declined in the Fall of 1920 (R-43, 44, 75), and the testimony of the Receiver that values had declined at least 25% (R-21, 83, 84), and in view of the common knowledge that the period was one of drastic deflation and that merchandise actually declined 30-32% in October, 1920, it appears that a reduction of \$2700.00 was wholly inadequate and that the figures of the Referee in fixing the amount of assets was very liberal toward Appellees.

AVERAGE RETAIL PRICE OF 10 ARTICLES OF DRY GOODS
ON MAY 15, AUGUST 15, OCTOBER 15, 1920,
AND ON FEBRUARY 15, MAY 15, 1921.
SEATTLE, WASHINGTON.

ARTICLE.	Unit.	1920			1921	
		May 15	Aug. 15	Oct. 15	Feb. 15	May 15
Calico, 24 to 25 inch.....	Yard	\$0.250	\$0.317	\$0.250	\$0.150	\$0.145
Percale	Yard	.520	.571	.470	.317	.283
Gingham, apron, 27 to 28 inch..	Yard	.350	.358	.330	.192	.192
Gingham, dress, 27 inch.....	Yard	.419	.443	.439	.259	.244
Gingham, dress, 32 inch.....	Yard	.700	.741	.750	.543	.537
Muslin, bleached	Yard	.500	.481	.351	.251	.235
Sheeting, bleached 9-4	Yard	1.177	1.175	1.119	.708	.708
Sheets, bleached, 81 by 90.....	Each	3.118	3.005	2.895	1.800	1.785
Outing flannel, 27 to 28 inch....	Yard	.441	.456	.435	.263	.237
Flannel, white wool, 27 inch....	Yard	1.467	1.575	1.575	1.225	1.288
Blankets, cotton, 66 by 80.....	Pair	6.071	5.790	5.825	4.700	4.479

The foregoing tabulation is taken from public documents of the Government Printing Office issued by the Department of Labor in its Monthly Labor Review (October, 1921-December, 1921) of the Bureau of Labor Statistics, U. S. Department of Labor, entitled "Price and Cost of Living." Also see Monthly Labor Review, Vol. 15, No. 2 (August, 1922, pg. 63), issued by the U. S. Department of Labor, Bureau of Labor Statistics, covering prices on same articles of merchandise under date of February 15 and May 15, 1921.

Fall and Winter merchandise was undoubtedly purchased during the Summer of 1920 and the table

above shows that calico had declined from the August figure of \$0.317 to \$0.250 on October 15, a decline of 21%; to \$0.150 on February 15, a decline of 52%; and to \$0.145 on May 15, a decline of 54% from August 15, 1920, figures.

Percale sold for \$0.571 on August 15 and dropped to \$0.470 or 17% on October 15; to \$0.317 or 44% on February 15; to \$0.283 or 50% on May 15.

Apron gingham sold for \$0.358 on October 15, 1920, and declined to \$0.330 or 7% on October 15; to \$0.192 or 46% on February 15; and to \$0.192 or 46% on May 15.

Dress gingham sold on August 15, 1920, for \$0.741, on October 15 for \$0.750, an increase of 1%; on February 15, 1921, for \$0.543, a decline of 26%; on May 15 for \$0.537, a decline of 27%.

Bleached muslin sold on August 15, 1920, for \$0.481, on October 15 for \$0.351, a decline of 27%; on February 15, 1921, for \$0.251, a decline of 48%; on May 15 for \$0.235, a decline of 51%.

Without giving actual figures on balance of the items a calculation of all the items together will show an average decline from prices on August 15,

1920, as follows:

Decline on October 15, 1920....	3%
Decline on February 15, 1921..	30%
Decline on May 15, 1921.....	32%

Accordingly the inventory of merchandise showing \$27,862.25 was subject to a reduction of 30%, or \$8,358.68. The value of the goods purchased new and fresh from wholesalers was \$19,503.57. It is a matter of common knowledge that stocks offered for sale never bring full wholesale value and hence the stock was actually worth less, and the record shows that the bankrupt had offers of but 60% for the merchandise (R. 136, 137).

The value to be placed on the merchandise must be its value at the time and place under consideration. The business conditions existing at Chehalis was described as demoralized (R. 128) and there was absolutely no business—business was at a standstill (R. 75); it was “at a time of serious financial depression when buyers of merchandise stocks would be comparatively few and cautious in bidding” (Carson brief pg. 20).

The statement of the Carson brief on Page 17 “that the debtor company had a net worth of \$2945.07 on April 26, 1921, as shown by the entries in its trial balance book (Trustee’s Exhibit B) of

that date and based upon an actual inventory made by Mr. Elliott between the dates of April 23 and 26th," is erroneous. At that time Mr. Elliott took an inventory and estimated the value of the merchandise. He left on April 26, his successor, Mr. Hart, completed the inventory by placing actual market values upon the merchandise and when he had completed it he brought it to Mr. LeSourd on May 2nd, and it appeared that the liabilities were greatly in excess of assets (R. 41). Thus the inventory taken the last of April upon actual market value—replacement figures—shows plainly the unreliability of the figures Elliott kept in his books. In short, all inventories of merchandise taken upon cost prices were about 50% higher than inventories taken at market prices, which is the price at which the same merchandise could be replaced by buying in the open market. The so-called discrepancy, of which Counsel complains, is the difference in value of merchandise in the open market and what the same merchandise had actually cost the bankrupt at the time it was purchased during the year preceding the decline in values occurring in the Fall of 1920.

The Bankruptcy Act requires the Referee to place a fair valuation upon all assets, not a nominal

or paper valuation which the books may show. Sec. 1 (15), of the Bankruptcy Act provides:

“A person shall be deemed insolvent within the meaning of this Act whenever the aggregate of his property shall not at a fair valuation be sufficient in amount to pay his debts.”

A fair valuation is the fair, market price which a seller willing to sell would accept from a buyer willing to buy at that price.

Grandison vs. Bank, 231 Fed. 800, 806 (2nd C. C. A.).

The unreliability of financial statements showing true and actual assets is noted in

Conover vs. Hull, 10 Wash. 673, Page 686, 30 Pac. 166.

The record further shows that it was understood that the values placed upon the merchandise by Mr. Elliott were exaggerated. Mr. LeSourd wrote Mr. Abel on April 9, 1921, that:—

“The inventory is without a doubt much too high and there is grave question whether or not the business will more than pay the indebtedness and it has been decided to carry on a closing out sale and liquidate the corporate business in that way” (R. 132).

STATE LAW PROHIBITING PREFERENCES BY INSOLVENT CORPORATIONS.

ARE THE RIGHTS OF THE TRUSTEE IN THIS PROCEED-
ING CONFINED TO THE PROVISIONS OF 57-G,
60-B, 67-E, CONSTRUED IN CON-
JUNCTION?

Under this heading Appellees argue that the right of the Trustee to object to their claims are found in said sections only. It is worthy of note that no case in point or text sustains the contention of Appellees. The case cited by Appellees

Western Tie & Timber Co. vs. Brown, 196
U. S. 502

does not sustain their contention but does sustain Appellant. The Supreme Court held the lower court erred in refusing to permit the creditor to prove his claim under Sec. 57-g but held that the right of set-off was proper. The court said:

“The result will be that the Tie Company will be a creditor of the estate for the whole amount of its claim, and will be, at the same time, a debtor to the estate for the amount of the deductions from the pay rolls collected by it, the court below, of course, having power to take such steps as may be lawful to protect the

estate in respect to payment of dividends to the Tie Company, in the event that company does not discharge its obligations to the bankrupt estate."

So here Appellees may prove the full amount of their claims and at the same time are debtors to the estate for payments received contrary to the law of the State which the court will protect by proper orders relating to payment of dividends.

Sec. 2 of the Bankruptcy Act provides:

"That the courts of bankruptcy as hereinbefore defined * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to * * * (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."

Sec. 57-D:

"Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Sec. 57-F:

"Objections to claims shall be heard and determined as soon as the convenience of the court and the best interest of the estates and the claimants will permit."

Sec. 57-G:

“Claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.”

The Trustee's rights are found in the following Sections of the Act:

Sec. 8 of the Act of June 25, 1910, amending Sec. 47, cl. 2 of Act of 1898, provides that a Trustee:—

“Shall be deemed vested with all the rights, remedies, powers of a judgment creditor holding an execution duly returned unsatisfied.”

Sec. 60-B authorizes the Trustee to set aside the statutory preference defined by the Act in said section.

Sec. 67-A, B, C, nullifies certain liens, including liens obtained by legal proceedings within four months.

Sec. 67-E provides that all conveyances within four months made with intent to defraud shall be null and void except as to purchasers in good faith for present fair consideration. Also that all conveyances within four months during insolvency

which are null and void as against creditors by State law shall be null and void as against the Trustee.

Sec. 70-A confers upon the Trustee the title of the bankrupt; Sec. 70-A(4) gives the Trustee title to property transferred by bankrupt in defraud of creditors.

Sec. 70-E, authorizes the Trustee to avoid any transfer by the bankrupt of his property which any creditor might have avoided and confers jurisdiction upon courts of bankruptcy.

Careful consideration of these sections shows the rights of a Trustee are three-fold: (1) Under Sec. 70-A the Trustee has all the title that the bankrupt had; (2) under Sec. 70-A(4), and 70-E, Sec. 67-B, and Sec. 47-(2), the Trustee has all the rights that creditors of the bankrupt had; (3) the Trustee has the peculiar rights created by the statute as to preference in 60-B, nullifying liens obtained by legal proceedings within four months while insolvent under 67-C; and 67-E, avoiding all transfers within four months made with intent to defraud and also all conveyances within four months while insolvent which are null and void as against creditors.

In creating these special statutory rights found in Sec. 60-B relating to preferences and in 67-E relating to fraudulent conveyances under specified terms and conditions the Congress provided in both Section 60 and 67 that for the purpose of recovering such preferences or such fraudulent transfers that Courts of Bankruptcy and State Courts should have concurrent jurisdiction and also provided in Sec. 57-G that the claims of any creditors who had received such preferences or such voidable transfers should not be allowed unless same were surrendered. Since the right of the Trustee as to preferences defined in 60-B and the right to avoid conveyances defined in 67-E were of purely statutory origin and creation, it was necessary that the Act should expressly provide for the enforcement of such right both for the purpose of recovery and for the purpose of defense. Hence, express provision is made by Sections 60 and 67 for suit by the Trustee in either Courts of Bankruptcy or in the State Court and the right to defend against claims on file is expressly given by Section 57-G.

The right of the Trustee to object to claims on file on any ground which the bankrupt might have asserted or which creditors might have asserted is expressly given by Sec. 70-A, 70-E, 67-B, taken to-

gether with Sec. 47-(2). The right of the Trustee to object to claims filed with the Referee under Sec. 70-E on the ground that a creditor has received a preference prohibited by State law is well established in

Irwin vs. Maple, 252 Fed. 10, (6 C. C. A.).

In re. Creech Bros. Lumber Co., 240 Fed. 8 (9 C. C. A.).

Objections by a Trustee to claims setting up practically every defense known to the law are found in a multitude of cases set out in Remington on Bankruptcy, (2nd Edition), Sec. 803, 803½, 1193 to 1202 inc. citing cases where the Trustee set up such defenses as statute of limitations, statute of frauds, estoppel, illegality, usury, waiver, abandonment of lien, merger of title, payment, accord and satisfaction, fraud, etc. A full discussion of the rights of the Trustee are found in Remington on Bankruptcy, (2nd. Ed.) Sections 1137-1497.

See

Moore vs. Crandall, 205 Fed. 689, (9 C. C. A.).

Wells vs. Lincoln, 214 Fed. 227, (9 C. C. A.).

Pacific States Bank vs. Coats, 205 Fed. 618, (9 C. C. A.).

In re Bement, 172 Fed. 98, (C. C. A. 8).

In re Omaha Motor Car Co., 245 Fed. 546,
(C. C. A. 8).

In re Standard Telephone & Elec. Co., 216
U. S. 545, 24 A. B. R. 761.

Conclusion. Since the Referee found the bankrupt was insolvent in the bankruptcy sense and that all payments were made within four months, this case falls within Sec. 67-E and therefore within the provisions of Sec. 67-G, but the foregoing authorities conclusively show that the Trustee may rely on Sec. 70-E alone for the purpose of making objections to claims filed with the Referee.

INSOLVENCY UNDER STATE LAW.

Counsel for Bank does not dispute the rule laid down in our opening brief that a corporation is insolvent in the State of Washington when it is unable to pay its bills as they mature in due course of business, except Counsel says:—

“We believe the real test of insolvency is general inability to pay its debts in due course of business and not mere inability to pay one or a few of its debts.”

(Bank brief, p. 26).

Counsel for Carson, Pirie Scott & Co. disputes the rule relying on the early decisions of the Supreme Court. It may be observed that the court in its early history uttered expressions to the effect that a corporation was not insolvent although its liabilities exceeded its assets and it was unable to pay its debts in due course, if the corporation was a going concern and intended to continue in business. Counsel cites

Leslie vs. Wilshire, 6 Wash. 282, 33 Pac. 505.

Vincent vs. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

Smith vs. Hopkins, 10 Wash. 77, 38 Pac. 854.

Biddle Pur. Co. vs. Port Townsend Steel Co.,
16 Wash. 681, 48 Pac. 407.

The idea that the intent of the corporation to continue in business was a controlling consideration was later exploded in

Cook vs. Moody, 18 Wash. 114, 50 Pac. 1020.

The time honored definition of insolvency, the one followed by the Federal Courts prior to the Bankruptcy Act of 1898, that a *corporation is insolvent when it is unable to pay its debts as they mature in due course of business*, was laid down in

State Ex Rel Strohl vs. Superior Court, 20 Wash. 545, 56 Pac. 35.

Owing to the special facts stated in the opinion a somewhat different rule was laid down in

Strohl vs. Seattle National Bank, 25 Wash. 28, 56 Pac. 35.

In 1909, the rule that a corporation is insolvent when it is unable to meet its bills as they mature in due course of business was again stated in

Nixon vs. Hendy Machine Works, 51 Wash. 419, 99 Pac. 11

and has been uniformly followed since.

See

McKay vs. Sperry Flour Co., 95 Wash. 209, 163 Pac. 377.

Ronald vs. Schoenfield, 94 Wash. 238, 162 Pac. 43.

Simpson vs. Western Hdw. & Metal Co., 97 Wash. 626, 167 Pac. 113.

Jones vs. Hoquiam Lbr. & Shingle Co., 98 Wash. 172, 167 Pac. 117.

McKnight vs. Shadbolt, 98 Wash. 665, 168 Pac. 473.

It seems to the Trustee that there is no room for argument or any doubt that the test of insolvency of corporations, so far as the rights of

creditors are concerned, is inability to pay debts as they mature in due course of business

GOING CONCERN.

Appellees argue that the trust fund theory has never been applied by the Supreme Court of Washington to insolvent corporations, which were going concerns at the time of preference; that an exception is made in favor of corporations which are going concerns. Counsel cite the following cases:

Brooks vs. Skookum Mfg. Co., 9 Wash. 80,
37 Pac. 284.

Leslie vs. Wilshire, 6 Wash. 282, 33 Pac. 505,

Vincent vs. Snoqualmie Mill Co., 7 Wash. 566,
35 Pac. 396.

Smith vs. Hopkins, 10 Wash. 77, 38 Pac. 854.

Biddle Pur. Co. vs. Port Townsend Steel Co.,
16 Wash. 681, 48 Pac. 407.

Cook vs. Moody, 18 Wash. 114, 50 Pac. 1020.

An examination of the foregoing cases discloses, we believe, that they are not authorities for the exception contended for by Appellees.

In *Brooks vs. Skookum Mfg. Co.*, *supra*, it appeared that on February 25, 1891, the corporation gave a chattel mortgage on its stock, fixtures and building to secure a *present* loan of \$5000. Thereafter the creditor agreed to give an extension and to accept in lieu of the said mortgage a new mortgage which is in controversy. The new mortgage covered stock, plant and buildings, "being in great part the property included in the former mortgage, to secure—First, debt of \$4400 being the remainder due upon plaintiff's note and mortgage aforesaid; and second, the *claims of other creditors* amounting to about \$4000 whose claims are set out in detail in the mortgage. Whereupon the plaintiff cancelled the former mortgage of record." The court found that the liabilities exceeded assets if the "good will" was not considered; that the business was profitable and paying, that it was holding its own and it was expected would materially increase, that the "good will" was a valuable asset, that the first mortgage was valid and the second covered largely the same property although some additional property was included; that the company although pressed somewhat by creditors could get an extension of all debts then due and that such arrangements were made in a manner satisfactory to all

persons interested. Held that the facts were so dissimilar to those in *Thompson vs. Huron Lumber Co.*, that the rule there laid down did not apply.

Of this case it may be observed that there could be no preference to the creditor because the first mortgage was given for a *present* consideration and was admittedly valid and that the second was a renewal thereof. Second, that the second mortgage covered both the claim of the plaintiff and also the claims of other creditors so that all were treated *equally*. Third, that the arrangements made were satisfactory to all parties interested so that an estoppel existed. Fourth, this case has never been cited or referred to by any court.

Leslie vs. Wilshire, supra, considered a \$1700 chattel mortgage executed February 10, 1892, to secure an antecedent debt (milk sold February 1—February 10), a present consideration (release from contract) and future debts (sums to become due February 10-28). It is apparent that there was no preference because the consideration was *partly a present and partly a future consideration*.

In both of the above cases there was no preference under the construction of the trust fund theory adopted by this court in

Coler vs. Allen, 114 Fed. 611, (9 C. C. A. 1902).

Vincent vs. Snoqualmie Mill Co., *supra*, involved a mortgage given for the *purchase price*. There could be no preference because the consideration was a present consideration and could not cause a diminution of the corporation's assets.

Smith vs. Hopkins, *supra*, related to a case where the corporation was practically out of business and was in a desperate condition known to all concerned. *This case did not involve a going concern.*

Biddle Pur. Co. vs. Port Townsend Steel Co., *supra*, did not have under consideration a going concern.

Cook vs. Moody, *supra*:—

“The court found that no fraud was intended by Appellant or the company but also found that at the time of the execution of said mortgage said company was unable to pay its debts in the ordinary course of business affairs and was insolvent and would have been compelled to shut down its mill and cease doing business had it not been for the execution of said mortgage and the obtaining of the extension of time of payment of the indebtedness thereby admitted to be secured, all of which was well known to the said C. S. Moody (April 1896) the company continued to operate its

mill until November 15th, following when it shut down and has not done business since." Held, mortgage was invalid as a preference.

This case sustains Appellant and applies the trust fund theory to a going concern.

While there are expressions in some of the foregoing cases affording comfort to Appellees, the fact remains that such expressions are *dicta*; *none of the cases sustains the proposition that an insolvent corporation, while continuing to do business, may prefer its creditors.* In other words, the so called exception has not been recognized in the State of Washington in any of the decisions cited by Appellees.

The true explanation of *Brooks vs. Skookum Mfg. Co., supra*, so strongly relied upon by Appellees, which was decided in 1894 and has never been cited since by any court, and, also the other early cases cited by Appellees, is that these decisions were rendered during the years when the decisions contained expressions that insolvency did not exist even when liabilities exceeded assets or when inability to meet its debts as they matured in due course of business appeared; that insolvency existed only when the corporation had practically ceased business and did not intend to operate further.

See cases cited by Appellees which we have just discussed and are found in early Washington Reports up to Vol. 18. The doctrine of those cases became obsolete upon the adoption of the later rule defining insolvency of corporations as inability to pay their debts as they matured in due course of business in *State Ex Rel Strohl vs. Superior Court*, 20 Wash. 545, 56 Pac. 35, and uniformly followed in all subsequent cases.

See

Nixon vs. Hendy Mach. Wks., 51 Wash. 419,
99 Pac. 11.

Ronald vs. Schoenfeld, 94 Wash. 238, 162
Pac. 43.

Simpson vs. Western Hdw. & Metal Co., 97
Wash. 626, 167 Pac. 113.

Jones vs. Hoquiam Lbr. & Shingle Co., 98
Wash. 172, 167 Pac. 117.

McKay vs. Sperry Flour Co., 95 Wash. 209,
163 Pac. 377.

McKnight vs. Shadbolt, 98 Wash. 665, 168
Pac. 473.

On the other hand there are decisions meeting and answering Appellees' point and holding that an insolvent corporation, although a going concern, *cannot prefer* its creditors since all the assets of an

insolvent corporation are a trust fund for the benefit of all its creditors. And the doctrine has been applied to payments of money, deeds, bills of sale, assignment of accounts and transfers of personal property.

Benner vs. Scandinavian American Bank, 73 Wash. 488, 131 Pac. 1149.

Jones vs. Hoquiam Lumber & Shingle Co., 98 Wash. 172, 167 Pac. 117.

Simpson vs. Western Hdw. & Metal Co., 97 Wash. 622, 167 Pac. 113.

As said in *Grandison vs. Robertson*, 220 Fed. 85, (C. C. A. 2):

“ ‘The validity of the payment is not made to depend on whether it is made in the ordinary course of business or on whether the creditor has any reasonable ground to believe the debtor insolvent, but simply on whether there is insolvency, actual or imminent, and on an intent to prefer.’ ”

to prefer.’ *Baker vs. Emerson, et al*, 4 App. Div. 348, 38 N. Y. S. 576.”

PAYMENTS IN DUE COURSE.

Appellees contend that payments were made in due course of business. Appellant submits that this is true in a superficial sense only. The true condition of the bankrupt from January to May, 1921, was that of a business in process of dissolution and that payments were made in *due course of liquidation*. The record shows that as early as November, 1920, at the conference of Elliott, O'Brien and LeSourd at Seattle that the officers of the now bankrupt agreed to close out the business by selling in bulk to a purchaser, if one could be found, and otherwise to close out the store at retail (R. 50). Pursuant to this plan the bankrupt advertised in the newspapers for a purchaser and carried on negotiations with prospective purchasers.

As between Carson, Pirie Scott & Co. and the bankrupt, the transactions were not in due course of business because Carson, Pirie Scott & Co. refused to do business, refused to sell any merchandise, with the bankrupt after February, 1921. They demanded payment of their account and were paid \$4254.11 while the other merchandise creditors re-

ceived nothing on their accounts. The course of dealing between Carson, Pirie Scott & Co., and the bankrupt was manifestly one of liquidation and payments were made as fast as the conversion of assets into money permitted.

The Referee said:—

“It appears that, in about November, 1920, Charles O'Brien and the O'Brien estate were desirous of getting out of the business and sought to have the stock of goods reduced and the debts paid and the business sold out. The witness (the manager) proceeded to do this by putting on sales and running the stock down as best he could and so continued until he left on April 26, 1920” (R. 19).

“The claims filed in this case to date amount to \$16,740.29. I have no doubt from this resume of figures that the bankrupt was insolvent in December, 1920, when the manager, as stated, started in to reduce the stock and pay the debts. The manager made every possible effort to reduce the stock which could be made and to pay the debts during January, February, March, and up to April 25 when he abandoned the business and took service with the claimant herein, as he said because he had no further interest in the business.

“In December, 1920, the bankrupt owed for merchandise about \$16,240.92 and owed the bank \$5500, making a known indebtedness of \$21,740.92. Its inventory taken about December 31, 1920, was about \$26,371.39, about \$4000 of which covered fixtures, leaving the net stock about \$22,371.39, or about \$630.47 more than

the known debts. It would cost, and *did cost more than \$630.47 to convert the stock into cash for the payment of the debts. In fact, it cost about \$12,000, so that insolvency existed then and never got any better*" (R. 21). (Our italics.)

INSOLVENCY UNDER TRUST FUND THEORY.

In establishing a preference under the Bankruptcy Act insolvency in the sense that liabilities exceed assets must be proved by the trustee; but establishing a preference under the State trust fund theory insolvency in the sense that the debtor corporation is unable to pay its debts as they mature in due course of business, is all that the trustee need establish.

Simpson vs. Western Hdw. & Metal Co., 97 Wash. 626, 167 Pac. 113.

Stellwagen vs. Clum, 245 U. S. 605.

GOOD FAITH OF CREDITOR IMMATERIAL.

Appellees argue that, under the trust fund theory, it is necessary for the Trustee to prove that the creditor had either actual or constructive knowledge that a preference was effected. Appellees fail to cite any case holding that an action has failed because there was no evidence that the creditor had actual or constructive notice that he was receiving a preference. In other words, Appellees fail to cite a single case that want of knowledge or absence of reasonable cause to believe is a good defense.

On the other hand, a case directly in point, expressly held a defense that the transfer was in good faith on the part of both debtor and creditor and that there was no knowledge of insolvency to be unavailing, that a transfer while the corporation is insolvent giving a greater percentage constitutes a voidable transfer.

Jones vs. Hoquiam Lumber & Shingle Co., 98
Wash. 172, 167 Pac. 117.

Simpson vs. Western Hdw. & Metal Co., 97
Wash. 626, 167 Pac. 113.

Benner vs. Scandinavian American Bank, 73 Wash. 488, 131 Pac. 1149.

Williams vs. Davidson, 104 Wash. 315, 176 Pac. 334.

SET-OFF.

On this appeal and for the first time the Bank claims the right of set-off as to all payments made it by bankrupt. The Bank never pleaded the right of set-off. It never claimed before the Referee or before the District Court that it had the right of set-off to all payments made it by the bankrupt. The Bank claimed the right of set-off to \$143.08, which was on deposit at the time of bankruptcy (R. 99). The case was tried, argued, and submitted by the Bank and by the Trustee on the theory that the Bank claimed that it had a right of set-off to the deposit of \$143.08 only. This affirmative defense set up for the first time in the Appellate Court comes too late. Its consideration would work an injustice to the creditors of the bankrupt represented by the Trustee. Had this defense been interposed at the time of trial it would have been competent for the Trustee to meet it by showing that

the balances in the Bank were built up for the purpose of paying the debt due the Bank.

We earnestly urge that this defense cannot be raised for the first time in the Appellate Court; that it is too late to submit such an issue; that Counsel for Bank led the Trustee and the Court to believe that he claimed the right of set-off as to the deposit of \$143.08 only; that by his conduct he has waived the defense of set-off as to payments made to the Bank and that it would be a manifest injustice to take the position that the Bank took in the lower court and then make such a contention in the Appellate Court when the opportunity to meet it by evidence has passed.

“Subject to a few exceptions, which will be noticed hereafter, the rule is of almost universal application that questions, of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal. And a *fortiori*, where counsel declares on the trial in open court that only a certain question is involved in the case, or where, by stipulation, the case is submitted only on a certain question, other questions cannot be raised in the appellate court. In some jurisdictions there are express statutory declarations to the effect that questions of which a review is sought must be raised in the court below.”

2. “While the above stated general rule is supportable upon a number of considerations, it is usually placed upon the ground that the

opposite party should have the proper opportunity to avoid, by amendment or by supplying any defects in his proof, the effect of the objection."

3 C. J. 689.

B. GROUNDS OF DEFENSE OR OPPOSITION. (1)

In General. The rule that questions not raised in the lower court will not be considered in the appellate court is more frequently applied to a variety of instances which may, for the sake of convenient reference, be grouped under the head of grounds of defense or opposition, the general rule in such cases being that if a defendant in the trial court, by failure to plead, to request instructions or introduce evidence, to object to instructions or evidence, or otherwise, fails to present a defense which he might make, and submits issues not involving it, he will be bound in the appellate court by the case made by the pleadings and evidence as exhibited by the record, and cannot urge a defense which was not presented in the lower court. This is especially true where the defense which is sought to be urged in the appellate court is inconsistent with the defense or defenses relied upon in the court below.

OPPOSITION TO DEFENSE. On the same principle, where a defense was made in the trial court

and sustained, grounds of opposition hereto cannot, as a rule, be urged for the first time upon appeal.

3 C. J. 695. Also see 3 C. J. 719-723.

If, however, the matter is to be considered by this court the Trustee believes that the record shows that deposits were made in said Bank and balances built up so that the Bank could draw down \$500 every four or five days. See pages 42-43-44 of Appellant's opening brief.

We believe, the record shows that the payments made the Bank were made upon the specific understanding that the bankrupt should put on a special sale, deposit the money in the Bank so that same might be applied.

In fact, Mr. LeSourd told Mr. Donohue, Vice-President of the Bank, on April 26, that the Bank should not expect the bankrupt to pay everything that was taken in at the store on the Bank's claim (R. 35-36). We believe that the sums paid to the Bank by check were actual payments made and not the exercise of the right of set-off under the decision of this court and the cases cited in the opinion.

First Natl. Bank of El Centro vs. Harper,
254 Fed. 641.

PRESUMPTION FROM NON-PRODUCTION OF LETTERS.

This presumption applies to non-production of letters, documents and chattels as well as failure to produce available oral testimony.

22 *C. J.* 114.

Of course, the presumption is always stronger when a *subpoena duces tecum* or notice to produce has been served. Counsel for Appellees have cited only three cases holding that service of such a subpoena or notice to produce is necessary in order to obtain the benefit of the presumption, notwithstanding the fact that the rule was announced two hundred years ago.

Wigmore on Evidence, sec. 285, says:—

“The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party’s cause. Ever since the case of the chimney sweeper jewel this has been a recognized principle.”

ADDITIONAL AUTHORITY ON BANK- RUPTCY PREFERENCE.

In addition to the authorities cited on pages 17 and 18 of our opening brief is

Herron vs. Moore, 208 Fed. 134 (9 C. C. A.).

EQUALITY.

One of the chief purposes of the Bankruptcy Act is to secure equality in the distribution of the assets of the bankrupt among its creditors.

Healy vs. Wehrung, 229 Fed. 686 (9 C. C. A.).

The philosophy underlying the Act is that under insolvency the assets are impressed with a trust for the benefit of creditors; that the assets are a trust fund for the equal benefit of all creditors.

Remington, 2nd Ed. Section 1274.

The trust fund theory is a theory of courts of equity adopted to prevent fraud, favoritism and unjust discrimination upon the part of corporations

in their relations with their creditors. Its intent and purpose is to secure a just and equal distribution of the assets of insolvent corporations among its creditors. This doctrine is stated at length and in detail in

Conover vs. Hull, 10 Wash. 673, 39 Pac. 166.

In *McKnight vs. Shadbolt*, 98 Wash. 665, 167 Pac. 473, the court said:—

“There is no reason, either in law or equity, why a party to a preferential transaction should be protected.”

The Trustee respectfully submits that his objections were well founded under both the Bankruptcy Act and under the State law.

Respectfully submitted,

NELSON R. ANDERSON,

Attorney for Appellant.

**United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT**

In the Matter of
**ELLIOTT-O'BRIEN COMPANY, a Corporation,
Bankrupt**

**S. G. CLIMENSON, as Trustee of ELLIOTT,
O'BRIEN COMPANY, a Corporation,
Bankrupt.**

Appellant

vs.

CARSON, PIRIE SCOTT & COMPANY, a

**Corporation; COFFMAN, D O B S O N
BANK & TRUST COMPANY a Corpora-
tion; BEE NUGGETT PUBLISHING
COMPANY, a Corporation,**

Appellees

Additional Authority

SUBMITTED BY APPELLEES

**A. A. HULL and J. E. MURRAY of Chehalis Wash-
ington, Attorneys for Appellee Coffman-Dob-
son Bank & Trust Company.**

**W. A. McCLURE and GEORGE N. WOODLEY,
Attorneys for Appellee Carson, Pirie Scott &
Company.**

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COMPANY, a Corporation,

Appellees

Additional Authority

SUBMITTED BY APPELLEES

Pursuant to permission granted by this court,
the following authorities, in addition to those cited in
the briefs of the appellees, are submitted:

BANK'S RIGHT OF SET-OFF

The points involved under the principle of set-off apply only to the claim of the appellee bank.

In the Bank's brief the following case was cited but with the citation to the Federal Reporter only and it is now given with the full citation, viz:

Studley vs Boylston National Bank 200 *Fed*
249; 29 *Am. B. R.* 649; 229 *U. S.* 523 57 *L. ed*
1313.

The foregoing case contains a thorough discussion of the right of the bank to set off against the depositor's obligation due it, the depositor's bank balance, and holds that if such applications are made by the check of the depositor, it is in effect the same thing as a direct application by the bank.

See also:

New York County Bank vs Massey
192 *U. S.* 138
24*S. Ct.* 199
48 *L ed* 380

to the same effect as *Studley case Supra*.

See also:

7C. J. 654

2 *Michie on Banks and Banking* 1019 1030

Morse on Banks and Banking (3d ed.) *Section* 324.

8 *Flecher Cyclopedia Corporations* 8792
et seq.

3 *R. C. L. Section* 81, *page* 252

The authorities cited above will clearly show the facts in the case cited by the appellant, viz.,

First National Bank vs Harper

254 *Fed.* 641

are essentially different from those in the case at bar.

Counsel for the appellant urges to this court that the question of the bank's right of set-off was not raised in the court below and regardless of the controversy between counsel over this question, the appellee bank submits that it was raised below in that the claim of bank was filed and objections to its allowance were made and filed. At a hearing on

objections, the objections are treated as the bill, and the proof of debt as the answer.

1 *Collier on Bankruptcy* (12th ed.) 812

and these are the only pleadings required. Such pleadings necessarily admit of any defense to the objections which may be raised.

It seems that technical pleadings are done away with and that even the trustee's objections may be oral.

1. *Collier on Bankruptcy* (12th ed) 813

In this case the bank orally replied to the trustees objections.

(*Appellant's brief, page 6*)

The evidence in this case comprehended every conceivable fact and all parties in interest were present and testifying, and the relations of the bank and the depositor were fully gone into, disclosing that the issue was considered at the time of the hearing before Referee. Such a situation does away with the necessity for any pleadings.

Orr vs Park (C. C. A. 5th Cir.)

25 *Am. B. R.* 554

183 *Fed.* 683

In re Cannon (D. C. Pa.)

14 *Am. B. R.* 114

33 *Fed.* 837

In any event, this court would affirm the decision of the referee and district judge if it is legally correct, notwithstanding that it might have been decided upon a wrong theory. In other words, it matters not what theory the court adopted if its conclusion was right, it will be affirmed on appeal. This is elementary.

Title Guaranty & Surety Co., vs Coffman-Dobson etc. 97 *Wash.* 211. See page 218 as follows:

“Even if the theory of the trial court was erroneous, it matters not what theory it adopted as long as the conclusion is sound and the judgment can be sustained by the evidence.”

INSOLVENCY UNDER THE STATE LAW

Appellant contends that the mere fact of inability

ty of a corporation to pay debts as they mature in due course of business constitutes insolvency. We submit that this is too strong a statement and that the true rule, as applied to the instant case, is that such inability constitutes merely a presumption of insolvency, which is rebuttable and which presumption has been rebutted by the facts of this case. Certainly every corporation, like every individual, has a right to continue the struggle for existence and a right to be unhampered in making that struggle, and the courts will not lay down a rule precluding it from so doing until it appears from the facts of each case that continuation of the effort is harmful to its creditors. In support of our contention we refer the court to the authorities cited in the briefs of the appellees already on file and in particular to the following:

Leslie vs Wilshire 6 Wash. 282, 33 Pac. 505
Brooks vs Skookum Mfg. Co., 9 Wash 80,
37 Pac. 284

Simons vs Cissna 52 Wash. 115, 100 Pac. 200

Johns vs Coffee, 74 Wash. 189. 133 Pac. 4

We also submit that the same test is not applied arbitrarily to all corporations regardless of the facts involved. The same test should not be applied to a corporation that cannot pay its debts as they mature in the usual course of business and which has ceased doing business, as should be applied, for instance, to a corporation which might not be able to pay its debts but which is still a going concern.

Brooks vs. Skookum Mfg. Co 9 Wash. 80
37 Pac. 284
14a C. J. 899, Section 3076.

Respectfully Submitted,

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of ELLIOTT-O'BRIEN COM-
PANY, a corporation, Bankrupt,

S. G. CLIMENSON, as Trustee of ELLIOTT-
O'BRIEN COMPANY, a corporation, Bank-
rupt,

Appellant,

vs.

CARSON, PIRIE, SCOTT & COMPANY, a Cor-
poration; COFFMAN, DOBSON BANK &
TRUST COMPANY, a Corporation; BEE
NUGGET PUBLISHING COMPANY, a cor-
poration,

Appellees.

PETITION FOR RE-HEARING

NELSON R. ANDERSON,

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of ELLIOTT-O'BRIEN COMPANY, a corporation, Bankrupt,

S. G. CLIMENSON, as Trustee of ELLIOTT-O'BRIEN COMPANY, a corporation, Bankrupt,

Appellant,

vs.

CARSON, PIRIE, SCOTT & COMPANY, a Corporation; COFFMAN, DOBSON BANK & TRUST COMPANY, a Corporation; BEE NUGGET PUBLISHING COMPANY, a corporation,

Appellees.

PETITION FOR RE-HEARING

NELSON R. ANDERSON,

Attorney for Appellants.

PETITION FOR RE-HEARING.

Comes now S. G. Climenson as Trustee of Elliott-O'Brien Company, a Corporation, bankrupt, Appellant, and petitions the Court for a re-hearing of said cause and as grounds therefore respectfully shows the Court:

I.

The opinion says:

“These objections were filed under subdivision g of Section 57 of the Bankruptcy Act, which provides as follows:

‘g. The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.’

“Subdivision b of Section 60 is the general provision relating to preferences under Bankruptcy Act. Subdivision e of Section 67 provides, among other things, as follows:

‘And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the trustee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.’ ”

The objections of the Trustee based on the ground of *preferences under the Bankruptcy Act* were necessarily filed under subdivision g of Section 57, above quoted.

But Appellant, as heretofore, contends that the objections of the Trustee, so far as said objections are *based on preferences under the State law*, were not filed under Sections 57g and 67e as stated in the opinion.

While the objections *might* be considered as filed under subdivision e of Section 67 and subdivision g of Section 57, the rights of the Trustee were not *limited* and *confined* to Section 67e. The fact is said objections were filed under subdivision e of Section 70 reading as follows:

“e. The trustee may avoid any transfer by the bankrupt of his property which any

creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The Trustee's reliance on Section 70e is expressly sustained by the Circuit Court of Appeals for the 2nd Circuit and by the United States Supreme Court:

Cordoso vs. Brooklyn Trust Co., 228 Fed. 333;
142 C. C. A. 625.

Stellwagen vs. Clum, 245 U. S. 605; 41 A. B.
R. 1.

The *Cordoso* case involved a preference under the laws of New York wherein the transfer was made nine months before bankruptcy and hence could not come within Section 67e prescribing a four months limitation. The Court placed it under Section 70e.

The *Stellwagen* case involved a preference under the laws of Ohio. Mr. Justice Day said of Section 70e:

“This section as construed by this court gives the Trustee in Bankruptcy a right of action to recover property transferred in violation of state law.

“And a right of action in this subdivision is not subject to the four months’ limitation or other sections (60 B, 67 E) of the Bankruptcy Act. In this subdivision, if a creditor could have avoided a transfer under state law, a Trustee may do the same.”

Referring to Sec. 70e, 7 C. J. 182, says:

“The effect of this provision is to give to the Trustee the same rights with respect to such transfers as are conferred on the bankrupt’s creditors, or any of them, by the common law or the statutory law of the state where the property is located.”

Collier on Bankruptcy (1921 ed.), page 1178, referring to Sec. 70e, says:

“It is the corollary of Sec. 67b, and means simply that if a creditor could have avoided any transfer (not merely a lien) under the laws of the state, the Trustee can do the same,”

and cites *Williams vs. Davidson*, 104 Wash. 315, 176 Pac. 334.

The Supreme Court of the State of Washington has held that the right of a Trustee to recover pref-

erences under the State law is not subject to a four months' limitation, but has applied the rule to a transaction antedating bankruptcy by six months in one case and eleven months in another. Hence the case could not fall under Section 67e and did come within 70e.

Benner vs. Scandinavian American Bank, 73 Wash. 488; 131 Pac. 1149.

Jones vs. Hoquiam Lumber & Shingle Co., 98 Wash. 172; 167 Pac. 117.

The Trustee believes that the foregoing decisions establish *conclusively* that the right of the Trustee is not limited to the provisions of Sec. 67e, but that the Trustee may rely upon Sec. 70e of the Bankruptcy Act.

II.

The right of the Trustee to rely on Section 70e and to file objections to claims on the ground of preferences received contrary to the State law, is not found in subdivision g of Section 57 of the Bankruptcy Act as stated in the opinion.

The Trustee's objections were filed under the following Sections of the Bankruptcy Act:

Section 2:

“That the courts of bankruptcy * * * are hereby invested * * * (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.”

Section 57d:

“Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.”

Section 57F:

“Objections to claims shall be heard and determined as soon as the convenience of the court and the best interest of the estates and the claimants will permit.”

It is under the foregoing sections that objections to claims are commonly filed. Objections setting up such defenses as the bankrupt might have set up or *defenses that creditors of the bankrupt might have set up* are filed pursuant to the foregoing sections.

Collier on Bankruptcy, 10th ed. 812 *et seq.*

Remington on Bankruptcy, 2nd ed., pages 630-652.

Remington on Bankruptcy, 2nd ed., Sections 803, 803½, 11 92-1202.

Remington on Bankruptcy, 2nd ed., Sections 1137-1497.

In re. Rebman, 17 A. B. R. 767 (9 C. C. A.).

In re. Creech Bros. Lumber Co., 140 Fed. 8 (9 C. C. A.).

Moore vs. Crandall, 205 Fed. 689 (9 C. C. A.).

Wells vs. Lincoln, 214 Fed. 227 (9 C. C. A.).

Pacific States Bank vs. Coats, 205 Fed. 618 (9 C. C. A.).

In re Bement, 172 Fed. 98 (C. C. A. 8).

In re Omaha Motor Car Co., 245 Fed. 546 (C. C. A. 8).

In re Standard Telephone & Elec. Co., 216 U. S. 545, 24 A. B. R. 761.

The Trustee submits that under Section 2 (2), Section 57d, and Sec. 57f, that he may file objections to claims of creditors on any ground recognized by Sec. 70e of the Bankruptcy Act.

It is under these sections that Trustees have filed objections setting up such defenses as statute of limitations, statute of frauds, estoppel, illegality, usury, payment, fraud, etc.—in short, practically every defense known to the law. These things are matters of everyday practice in courts of bankruptcy.

Remington on Bankruptcy (2nd ed.), Sec.
1193-1202.

CONCLUSIONS.

Violation of state law gives rise to a cause of action in the Trustee under 70e.

Stellwagen vs. Clum, 245 U. S. 605.

The Trustee may object to any claim and set up any and all defenses that creditors possess under the law. Authorities above.

If this opinion is allowed to stand there will be one rule in the Federal Court and another in the State Court. Great confusion will result. Some will depend on the one rule and some on the other. We know of no case sustaining the opinion and, as we have pointed out, it is at variance and irreconcilable with the Washington cases above cited, and with the decision of the Supreme Court of the United States.

IV.

Finally, if Appellant should be in error in all we have said; if it be conceded for the sake of argu-

ment that Judge Rudkin is right in holding that the Trustee's objections were filed under Sec. 57g and 67e, still, the opinion is erroneous in holding that the trustee must prove insolvency in both the bankruptcy sense (excess of liabilities over assets) and in the State sense defined as non-payment of debts as they mature in the ordinary course of business; for the Trust Fund Theory prohibits a private corporation from preferring creditors in *either* kind of insolvency.

I. A corporation insolvent (1) in that its liabilities exceed assets and which (2) is unable to meet its obligations in due course of business, cannot prefer its creditors. Everyone would admit this.

II. A corporation whose liabilities do not *exceed* its assets but is unable to pay its obligations as they mature in due course of business, cannot prefer its creditors (insolvent in so-called state sense only).

Simpson vs. Western Hardware & Metal Co.,
97 Wash. 626, 167 Pac. 113.

III. A corporation insolvent only in the sense that its liabilities exceed its assets cannot prefer its creditors (insolvent in bankruptcy sense only).

Benner vs. Scandinavian American Bank, 73
Wash. 488, 131 Pac. 1149.

Under the opinion in this case, a trustee in bankruptcy must prove a transfer (1) within four months of bankruptcy, (2) insolvency in the bankruptcy sense, namely, excess of liabilities over assets, (3) insolvency in state sense as defined by opinion, namely, non-payment of debts as they mature in the ordinary course of business, (4) preference.

This is contrary to the law as laid down by the Supreme Court of the U. S. and by the Supreme Court of the State of Washington:

A.

Under the decisions of the United States Supreme Court, a trustee need not prove insolvency in the bankruptcy sense, but may prove insolvency under state law and (2) preference.

Stellwagen vs. Clum, 245 U. S. 605.

Under the decisions of the Circuit Court of Appeals for the 2nd Circuit the trustees need prove only (1) insolvency in the State sense and (2) preference.

Grandison vs. Robertson, 231 Fed. 785.

Cordoso vs. Brooklyn Trust Co., 228 Fed. 33.

B.

Under the decisions of the Supreme Court of the State of Washington, insolvency in the bankruptcy sense need not be proved; *proof in the so-called State sense alone* is sufficient.

Simpson vs. Western Hardware & Metal Co.,
97 Wash. 626, 167 Pac. 113.

Insolvency in the so-called State sense need not be proven; *proof in the bankruptcy sense only* need be proved.

Benner vs. Scandinavian-American Bank, 73
Wash. 488.

Nor is a trustee required to prove the transfer within four months.

Benner vs. Scandinavian American Bank, 73
Wash. 488, 131 Pac. 1149.

Jones vs. Hoquiam Lumber & Shingle Co., 98
Wash. 172, 167 Pac. 117.

The rule is the same in New York.

Cordoso vs. Brooklyn Trust Co., 228 Fed. 333.

The rule laid down in the opinion is at variance with the rule of the State Court in two particulars: the Federal rule requires proof of insolvency in both the bankruptcy sense and in the State sense and, second, the transfer must be within four months. The State Courts hold proof of insolvency in *either* sense is sufficient and, second, there is no four months limitation.

BASIS OF TRUST FUND THEORY.

All the Washington decisions are rested chiefly on Section 741 (5) Rem. Comp. Sts. (1922) reading as follows:

“A receiver may be appointed by the Court in the following cases: (5) When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.”

If there is imminent danger of insolvency a receiver will be appointed.

State ex rel. Strohl vs. Superior Court, 20 Wash. 545.

Kahle vs. Ind. Loan & Inv. Co., 103 Wash. 273, 174 Pac. 23.

The object and purpose of the theory is to secure an equal and ratable distribution of assets among the creditors, to prevent discrimination and preferences.

Thompson vs. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

Conover vs. Hull, 10 Wash. 673, 39 Pac. 166.

A corporation whose liabilities exceed assets is more certain to prefer than one merely unable to pay in due course. The reason for the rule prohibiting preferences is more apparent and more imperative.

It appeared in evidence that the state court appointed a receiver on the ground of insolvency on May 7, 1921 (Trustee's Exhibit "G", R. 154). There was no material change in the condition of this corporation in the month's period preceding. If it was insolvent on May 7th, it was surely in *imminent* danger of insolvency during the month of April, certainly five days before, and had the court given effect to the statute above quoted, it would have held payments made to appellees during April, 1921, were made during the time when the now bankrupt was in imminent danger of insolvency.

The error of the opinion lies in holding that the

definition of insolvency, namely: "inability to pay debts as they mature in the ordinary course of business" is an *exclusive* definition. There is no decision and no statement in any of the decisions of the state court that a corporation is not insolvent when it appears that its liabilities are in excess of assets. There is one late decision holding that a corporation whose liabilities exceed its assets is insolvent and that a preference under such conditions will be set aside.

Benner vs. Scandinavian-American Bank, 73 Wash. 488, 131 Pac. 1149.

The Washington court holds that it is not necessary to prove absolute insolvency, meaning excess of liabilities over assets, but that it is sufficient to show that the corporation is not paying its obligations as they mature in the ordinary course of business. Such is the plain reasoning of the cases cited in the opinion:

Nixon vs. Hendy Machine Works, 51 Wash. 419;

State ex rel. Strohl vs. Superior Court, 25 Wash. 545;

Jones vs. Hoquiam Lumber & Shingle Co., 98 Wash. 172.

Had this court followed the latest decision of the Supreme Court of the State of Washington in *Davidson vs. Williams*, 104 Wash. 315, where the court found liabilities exceeded assets and "during all of this time the corporation was heavily indebted, the greater portion of its indebtedness being past due, and it was unable to pay, and apparently was in a failing condition," judgment would have been rendered in favor of the trustee.

Had the court followed the decision in *Cunningham vs. Norbon*, 125 U. S., 77, 31 L. ed. 624, where the court said:

"When a person is unable to pay his debts he is understood to be insolvent. It is difficult to give a more accurate definition of insolvency",

judgment would have been for the trustee.

In this case the trustee in bankruptcy testified that the concern during 1921 was unable to pay its obligations as they matured in due course of business (Record 99). Mr. Elliott, president and manager of the bankrupt, testified the concern was unable to pay its debts in due course of business, as the books will show (Record 60, 152):

THE BANKRUPT'S LEDGER SHOWS

	Merchan- dise past due	Merchan- dise not due	Bank	Total
January	\$3,970.68	\$7,108.15	\$5,500.00	\$16,578.83
February	3,436.14	9,291.39	5,500.00	18,227.53
March	4,788.78	9,527.45	5,500.00	19,816.24
April	8,693.19	3,823.42	5,500.00	18,116.61
—(Trustee's Ex. "B" at R. 152.)				

The correspondence states that they were fearful lest some creditor whose account is past due will step in and ask for the appointment of a receiver.

There was no testimony that the concern was paying its bills in due course of business. There was no testimony that creditors were satisfied with the handling of the bankrupt's accounts, except some testimony that the Western Dry Goods Company, one of the creditors, was satisfied with receipt of payment of \$500.00 and a promise to pay the balance within the next two months. It is manifest that the creditors of this estate had no knowledge of any kind of the payments made to appellees.

Instead of being satisfied with what was taking place these creditors, had they known the facts, would not have extended any credit to the bankrupt concern. No wholesaler in the country would knowingly have sold a concern whose financial condition

was that of the bankrupt. None would have been satisfied with the appellees taking 80% of the money representing sales of the bankrupt during the last thirty-five days and receive nothing themselves. Such a statement carries its own refutation.

Brevity requires an end, and we believe consideration of the foregoing petition will show the error of the court.

Respectfully submitted,

NELSON R. ANDERSON,

51 Attorney for Appellants.
Jr 30

